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INDIAN LAW [illegible]

BOMBAY [illegible]

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PRIVY COUNCIL — J [illegible]

HIGH COURT, BOMBAY — K Mc[illegible]; G G [illegible]; RATANLAL R[illegible]; J G R[illegible]

VOL XL

1916

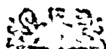
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BY

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THE MANAGER, YERAVDA PRISON PRESS, POONA, [illegible]
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THE SUPERINTENDENT OF GOVERNMENT PRINTING, [illegible]



THE INDIAN LAW REPORTS.

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

Editor

W. L. WELDON, *Barrister-at-Law.*

Reporters

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VOL. XL.

1916.

Published under the Authority of the Governor-General in Council,

BY

THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;

THE MANAGER, YERAVDA PRISON PRESS, POONA;

THE CURATOR OF GOVERNMENT BOOKS, NORTH-WESTERN PROVINCES AND OUDH,

AND

THE SUPERINTENDENT OF GOVERNMENT PRINTING, BENGAL.

JUDGES OF THE HIGH COURT

Chief Justices:

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" " S L BATCHELOR, *Kt* (*Acting*)

Puisne Judges

THE HON SIR S L BATCHELOR, *Kt*
" " DINSHA D DAVAR, *Kt* (*Died*)
MR F C O BEAMAN
" SIR J J HEATON, *Kt*
" MR N C MACLEOD
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" " T J STRANGMAN (*Advocate General*)
MR G D FRENCH (*Legal Remembrancer*)

CORRIGENDA

Page 51 headnote line 4 *for* Second Schedule *read* First Schedule

Page 51 headnote line 6 *for* Second Schedule *read* ' First Schedule

Page 277 line 6 *insert* from *after* for

Page 301 headnote line 8 from bottom *for* Bomday *read* Bombay '

Page 501 line 2 from bottom *for* Narayana *read* Narayan a

Page 633 line 5 *for* Carver's *read* Carver '

TABLE OF CASES REPORTED

(I L R 40 Bombay)

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Per MACLEOD J —No application can be made to obtain a decree on an award except as provided for in section 89 of the Code of Civil Procedure (Act V of 1908) Under that section the provisions of the Second Schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded An arbitration between the parties to a suit without an order of the Court has not been excluded and must therefore come under the provisions which deal with arbitrations without the intervention of the Court

SHAVAKSHAW *v* TYAB HAJI AYUB (1916) 40 Bom 386

CIVIL PROCEDURE CODE (ACT V OF 1908) SEC 92—*Suit by a trustee against a co trustee—Administration suit—Will—Charitable or religious trusts—Jurisdiction—Practice*] The plaintiff as one of the two surviving executors of the will of one Harjivandas Purshotam dated the 15th June 1893 sued the defendant executor in the First Class Subordinate Judge s Court at Ahmedabad—(*a*) for accounts of the property of the deceased from 1899 and onwards (*b*) for an injunction restraining the defendant from further management of the estate without plaintiff s consent and (*c*) for an injunction restraining the defendant from interfering with the plaintiff s management of the said estate The will showed that the property was worth Rs 89 500 out of which Rs 19 500 were set apart for legacies and the balance of Rs 70 000 was bequeathed to purely charitable and religious purposes The Subordinate Judge held that he had no jurisdiction to entertain the suit as it fell within the purview of section 92 of the Civil Procedure Code 1908 The Joint Judge in appeal was of opinion that the suit as framed by the plaintiff was to obtain the assistance of the Court for the purpose of securing co operation with the defendant in the due administration of the estate according to the provisions and directions in the will and in so far as it sought this relief it did not come under section 92 of the Civil Procedure Code 1908 He therefore reversed the decree and remanded the case The defendant having appealed

Held affirming the order of remand made by the Joint Judge that the Subordinate Judge had jurisdiction to entertain the suit for there was nothing in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts and the plaint contained no prayer for relief of any of the kinds specified in section 92 of the Civil Procedure Code 1908

PER CURIAM —If any questions relating to charitable bequests should arise in the present case before the Subordinate Judge his proper course would be to give notice to the Advocate General in order that that officer might decide whether any action should be taken under section 92 of the Civil Procedure Code in order to get any of the specific reliefs referred to in that section It would be quite possible for the Subordinate Judge to continue the administration of the estate up to the point of separating the fund appropriated for particular charities as to which schemes would have to be framed and holding those funds in the possession of a Receiver until the Advocate General or the Collector had obtained the directions of the Court if such were necessary with reference to the disposal of those funds under some suitable scheme Such directions of course would have to be taken from the District Court under section 92

BAPUJI JAGANNATH *v* GOVINDLAL KASANDAS (1916) 40 Bom 439

———————————————— SEC 92—*Suit for administration of religious wakf property—Court of Wards Act (Bom Act I of 1905) sections 31 and ?—Court of Wards added as guardian ad litem in appeal—Omission to name such a guardian from the commencement not fatal to the suit—Suit not bad for want of notice under section 31 of the Court of Wards Act—Cross objections—Stamps*] The plaintiffs instituted a suit under section 92 of the Civil Procedure Code 1908 for the administration and management of a religious wakf property against the trustees of the institution. One of the four

——————DEED—*Deed of sale—Contemporaneous agreement to reconvey on payment of consideration—Lease for a term of years—Sale deed amounts in effect to a deed of mortgage—Debt treated as continuing—Property treated as security for repayment of debt*] The plaintiffs executed in favour of the defendants a sale deed of lands for Rs 2 500 a large part of which consisted of old bond debts Contemporaneously with it two more documents were executed between the parties One of them was an agreement of reconveyance executed by the defendants to the plaintiffs agreeing to reconvey the lands (1) if the sum of Rs 2 500 was repaid at a certain specified date and (2) on repayment with interest of sums if any spent by the defendants upon the lands or of any further sums borrowed from them The other document was a lease executed by the plaintiffs under which they took the lands on lease from the defendants for a period of ten years at an annual rental of Rs 287 which seemed to have been made up of Rs 62 the Government assessment on the lands and Rs 225 reserved as rent representing nine per cent on the principal sum of Rs 2 500 The plaintiffs filed the present suit for a declaration that the sale deed passed by them was in reality a mortgage and for an order allowing the plaintiffs to redeem the lands on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists Relief Act The trial Judge was of opinion that the transaction was a sale while the District Judge on appeal held it was a mortgage by conditional sale The defendants having appealed,

Held that the transaction was in reality a mortgage by conditional sale inasmuch as the apparent price viz Rs 2 500 was not the real price of the sale but was treated and regarded as a continuing debt between the parties, the property being made security for the repayment of that debt.

Maruti v Balaji (1900) 2 Bom L R 1008 followed

KASTURCHAND LAKHMAJI *v* JAKHIA PADIA (1915) 40 Bom 74

——————DOCUMENT—*Sale or mortgage—Sale with option of re purchase—Transfer of Property Act (IV of 1882) section 58, clause (c)*] The plaintiffs mortgaged in 1899 with the defendants 93 fields for Rs 8 000 the rate of interest agreed upon being 8 per cent per annum In 1904 the parties made up accounts under the mortgage and of other transactions and the plaintiffs were found indebted to the defendants for Rs 13 000 To pay the amount the plaintiffs sold to the defendants 20 out of 93 fields mortgaged. The sale-deed contained the provision that if within the period of 20 years the plaintiffs repaid Rs 13 000 in one lump sum or in instalments the defendants should reconvey the lands to the plaintiffs On the same day the plaintiffs executed to the defendants a permanent lease of the lands sold at a fixed annual rental of Rs 112 8-0 The plaintiffs alleged that the transaction of 1904 was a mortgage and sued to redeem the same in 1911 on accounts being taken under the Dekkhan Agriculturists Relief Act

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prohibited by the Government of India Notification of the 5th of August 1914 published in Bombay on the 7th of August 1914, (2) that the performance of the contract became impossible as no freight was procurable during the month of September from Bombay to Antwerp (3) that it was an implied condition and of the essence of the contract understood by both parties to be so, that there should be freight available from Bombay to Antwerp

Held, (1) that having regard to the form of the earlier notification dated 5th of August 1914 the plaintiffs were right in contending that the defendants might have performed their part of the contract on the 7th of August 1914 without contravening any law or being able to avoid it under section 56 of the Indian Contract Act as having been made unlawful after they had entered upon it

(2) The performance of the contract did not become impossible within the meaning of section 56 of the Indian Contract Act merely because freights from Bombay to Antwerp were not procurable from a commercial point of view, when the defendants repudiated the contract

(3) That no implied condition could be read into the contract that it was agreed by the parties that normal freight conditions should continue

(4) That the defendants had committed a technical breach of contract as the plaintiffs had not proved that they had any intention of shipping 1 000 tons of manganese to Antwerp in September nor had they suffered any loss on account of non shipment

Before a contract can be broken on the ground that the acts to be done have become impossible the Courts must be very sure that they are physically impossible Physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices

The latter part of section 56 deals with cases where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the making but before the performance of the contract and extends to such cases the general principle of law applicable to all contracts and expressed in section 23

KARL ETTLINGER *v* CHAGANDAS & CO (1915) 40 Bom. 301

CONTRACT ACT (IX OF 1872) secs 56 65—*Contract of charter party—Contract impossible of performance—Freight paid in advance—Export of goods shipped on board prohibited by Government—Claim for refund of freight—Bills of lading—Shipping orders—Common carriers—Carriers by sea—Private carriers—Carriers Act (III of 1865)—Carriers by sea excluded by the Carriers Act—Loss by way of demurrage*] On the 1st April 1915 the defendant Steamer Company entered into an agreement with C & Co a firm of freight contractors whereby the latter chartered the steamer Hejaz for a voyage Bombay to Naples Genoa and/or Marseilles any two discharging ports at charterer's option Subsequently the Jeddah was substituted for the Hejaz. The plaintiffs procured from C & Co freight for 2,500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants The plaintiffs put 2 500 bales of cotton on board the Jeddah and the defendants issued twenty five bills of lading relating to them having received in advance Rs 32 610 6 3 for freight The import of cotton into Genoa being prohibited by orders of Government the Jeddah did not leave the harbour and the voyage had to be abandoned Eventually the steamer unloaded her cargo and the plaintiff before getting delivery of their goods were required to deposit Rs 12 600 to cover the expenses and loss incurred by the ship The said sum was deposited by the plaintiffs under protest The plaintiffs subsequently demanded the return of Rs 32 610 6 3 paid by them for freight and on the defendants disputing their liability to return the amount filed the suit for the recovery of the freight paid and for an account of Rs 12 600 deposited to defray the costs of unloading

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DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 187)—*Redemption suit—Tagavi advance by Government nature of—Auction sale for non payment of the advance—Benami purchase by the mortgagee—Advantage gained in derogation of the rights of the mortgagor—Purchase enures for the benefit of the mortgagor—Indian Trusts Act (II of 1882) section 90—Transfer of Property Act (IV of 1882) section 76 clause (c)—Land Revenue Code (Bom Act V of 1879) sections 56 153—Land Improvement Loans Act (XIX of 1883) section 7*] One B passed a an mortgage of the properties in suit in favour of N on the 20th September 1894 After B s death his widow K for herself and on behalf of her minor daughter the plaintiff executed a fresh possessory mortgage in favour of defendant No 1 in 1903 and put him in possession Before the date of this mortgage K had obtained a *tagavi* advance from Government on survey No 311which was included in the mortgage In 1905 survey No 311 was sold by public auction for the arrears of *tagavi* and was purchased by defendant No 1 through his *gumasta*, defendant No 2 On the 4th August 1909 defendant No 1 assigned his mortgage rights to defendant No 3 and on the same day defendant No 2 sold survey No 311 to defendant No 3 In 1912 the plaintiff sued to redeem the survey number along with the other mortgaged property under the provisions of the Dekkhan Agriculturists Relief Act 1879 The defendant No 3 contended that since the sale the plaintiff had no right left in survey No 311 and was not entitled to redeem it On these pleadings the question arose for consideration whether the *tagavi* dues were a charge of public nature which the mortgagee was bound to pay and whether the sale having taken place the provisions of section 56 of the Land Revenue Code would apply so as to leave no room for the application of section 90 of the Indian Trusts Act with reference to the conduct of the mortgagee

Held that the *tagavi* advance was a charge of a public nature within the meaning of clause (c) of section 76 of the Transfer of Property Act 1882 It was a Government demand accruing due in respect of the land while it was in possession of the mortgagee

Held also that the sale having taken place owing to the default of the mortgagee section 90 of the Indian Trusts Act applied

Held further that section 56 of the Land Revenue Code did not apply as it was held as a fact that there had been no forfeiture such as would be a necessary condition precedent under section 153 of the Land Revenue Code to the application of the provisions of section 56 for the purposes of recovering dues as arrears of land revenue

CHHITA BHULA *v* BAI JAMNI (1916) 40 Bom 183

————————————————SEC 3 CL (*y*) AND SEC 10 A—*Suit for possession under a sale deed—Contemporaneous lease—Nature of suit—Intention of parties*] The plaintiff relying on his sale deed of 1887 sued to recover possession of the land in suit alleging that the defendant held it as his tenant under a lease of even date with the sale deed The defendant pleaded that his father and not the plaintiff was the purchaser under the deed of 1887 that the plaintiff was the savkar (creditor) who advanced money and the payment of interest was secured by the contemporaneous lease Both the lower Courts went into the question of intention of the parties under section 10A of the Dekkhan Agriculturists Relief Act and found the defendant s case established on facts On appeal to the High Court

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LIMITATION ACT (IX OF 1908)—ART 91—*Alienation by Hindu widow—Suit by reversioner to recover possession of property alienated—Alienation found to be sham—Limitation*] A Hindu widow having alienated a property of her husband the reversioners sued more than three years after the date of alienation to recover possession of the property It was found that the alienation was merely a sham The lower Courts held that Article 91 of the First Schedule of the Limitation Act 1908 did not apply and decreed the suit The defendant having appealed

Held that Article 91 of the First Schedule of the Limitation Act had no application for the apparent obstacle presented by the mortgage proved unreal and ineffectual

MANCHHARAM *v* PANABHAI LALLUBHAI (1915) 40 Bom 51

———————ARTS 92 93—*Suit to declare the forgery of an instrument—Attempt—Lease—Attempt to record a lease under the Record of Rights Act (Bom Act IV of 1903) is not an attempt to enforce*] The defendant applied to the Mamlatdar to record under the Record of Rights Act, 1903 a lease under which he claimed to be entitled to a rent of 100 cocoa nuts from the plaintiff The application was made on the 4th August 1908 but the plaintiff having complained that the document was a forgery the Mamlatdar declined to record it The defendant then applied to the Collector who on the 11th August 1909 ordered that the lease should be recorded On the strength of the record the defendant sued in the Mamlatdar's Court for the enforcement of the terms of the lease and recovered in April and July 1912 cocoanuts of the value of upwards of Rs 40 Within three years of the recovery of these cocoa nuts the plaintiff brought the suit to recover back the value of the cocoanuts on the footing of the alleged lease being a forgery The defendant contended that the suit was barred under Article 93 of the Limitation Act on the ground that it was filed more than three years after the 11th August 1909 the date of an attempt to enforce it against the plaintiff

Held that the suit was not barred under Article 93 of the Limitation Act 1908 as the first real attempt to enforce the lease took place when the defendant attempted to recover the rent under the lease and that attempt was made within three years of the institution of the suit The attempt to get the lease recorded under the Record of Rights Act could not be put higher than an unsuccessful attempt to have a document registered in a case in which registration was necessary (Art 92) and that such an attempt was not an attempt to enforce the lease

ACHUT RAYAPA *v* GOPAL SUBBAYA (1915) 40 Bom 23

———————ART 130—*Adverse possession against the previous holder—Rights of successive holder barred by limitation*

See SARANJAM 606

———————ARTS 140 141—*Suit by a reversioner—Mortgage—Redemption—Widow disappearance of—Presumption of death—Onus of proof—Indian Evidence Act (I of 1872) section 108*] One S died leaving him surviving his widow a daughter in law R In 1860 R passed a mortgage bond in favour of the 1st defendant's father In 1865 R disappeared and was not heard of since 1865 In 1911 the plaintiff as the reversioner of S sued to recover possession of the property alienated by R The defendants pleaded limitation The first Court decided in plaintiff's favour on the ground that under section 108 of the Indian Evidence Act the Court must presume that R died at the time of the suit and therefore the claim was in time The lower appellate Court reversed the decree and dismissed the suit holding that the presumption of R's death at the time of the suit could not be drawn and that the *onus probandi* which lay heavily on the plaintiff to show when R died was not discharged The plaintiff having appealed

Held, (1) that there was a resulting trust in favour of the settlor,

(2) that the persons entitled to the property on the failure of the trusts w the heirs of the settlor to be determined at the time of her death.

Where a person dies intestate and no administration is granted to his esta the term legal representative in section 83 of the Trusts Act must inclu the person or persons beneficially entitled who represent the interests of t deceased by virtue of inheritance The representative by inheritance is t be found according to law at the moment of the death of the deceased, t maxim being ' *Solus deus haeredem facere potest non homo*

DWARKADAS DAMODAR *v* DWARKADAS SHAMJI (1915) 40 Bom

SUIT RIGHT OF—*Civil Court—Jurisdiction—Order of forfeiture passed by Magistrate—Criminal Procedure Code (Act V of 1898) sections 523 524—Disposal of property—Sale proceeds credited to Government—Suit to recover the amount*] The plaintiff s house was searched in connection with a dacoity and certain property was attached on suspicion On a proclamation being i sued by the 2nd Class Magistrate under section 523 (2) of the Code of Criminal Procedure 1898, the plaintiff appeared before the Magistrate to e tablish his claim to the property The claim was disallowed and an order was passed under section 524 of the Criminal Procedure Code for sale of the property The sale proceeds having been credited to Government the plaintiff brought a suit for the

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THE

INDIAN LAW REPORTS.

Bombay Series

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

BAYABAI SAKALKAR (PLAINTIFF) *v.* HARIDAS RANCHHORDAS AND OTHERS (DEFENDANTS).*

1914
August 27.

Will—Bequest to a person not named in the will—Private directions given by the testator to one of his executors—Evidence as to who was intended to have the benefit of the bequest, admissibility of—The Indian Succession Act (X of 1865), sections 62, 67, 68, 69.

A testator provided by his will as follows:—

In accordance with directions that I am going to give in private to trustee No. 1 out of the trustees appointed by me, my trustees should entrust to Haridas Rs. 5,000 that may be received from my life policy and the shares of Tata and Co. also should be transferred to the person whose name will be disclosed by Haridas.

In a suit filed by B praying, *inter alia*, that Haridas should be ordered to disclose the private directions given by the testator and for declaration that she, B, was the person intended by the testator to have the benefit of the bequest:

Held, (1) that Haridas was bound to disclose the private directions given him by the testator and that evidence thereof was admissible;

(2) that the second part of the above clause should be read with the first part and that the shares must be transferred to a person whose name was given by the testator to Haridas, and that the power conferred on Haridas was therefore not a general but a special one.

* O. C. J. Suit No. 1045 of 1912.

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BAYABAI SAKALKER v HARIDAS RANCHHORDAS

THE facts of this case are sufficiently set forth in the judgment of the learned Judge

Gadgil with *Munsif* for the plaintiff

Desai with *Dadachanji* for defendants Nos 3 and 4

Kanga with *Dastur* for defendant No 5

Kanga with *Taraporewala* for defendant No 6

Defendants Nos 1 and 2 and 7 to 11 did not appear

MACLEOD, J —One Gokuldas Kanji, a Bhatia, died in Bombay about the 18th December 1910 leaving a widow Gangabai and a daughter Krishibai, a concubine Bayabai, plaintiff in the suit, and several illegitimate children said to be by her By his will he appointed defendants 1 to 5 in this suit executors and executrix Clause 7 of the will runs as follows —

> In accordance with the directions I am going to give in private to trustee No 1 out of the trustees appointed by me my trustees should entrust to Haridas Rs 5 000 that may be received from my life policy and the shares of Tata & Co also should be transferred to the person whose name will be disclosed by Haridas

The said Gangabai filed Suit No 24 of 1911 against the said executors and executrix, praying, *inter alia*, (*a*) that the estate of Gokuldas might be administered on the footing that he had died intestate, or in the alternative on the footing of the will, if proved to be genuine and valid, (*b*) that, so far as might be necessary, the will, if proved to be genuine, might be construed by the Court

In paragraph 9 of the plaint the plaintiff contended that several clauses of the will were void and inoperative

The defendants did not admit this in their written statement but were willing that the will should be construed *In paragraph 9 they said that certain persons* should be added as parties

It is admitted now that Bayabai, the present plaintiff, was the person in whose favour directions were given

to Haridas but her name was not mentioned in paragraph 9

The suit came on for hearing before Beaman J on the 20th June 1912

The learned Judge's notes, to which I have referred, contain merely the appearances for the parties No issues were raised from which it seems that the parties, in a friendly spirit, without argument, asked the learned Judge to construe the will

The judgment on cl 7 is as follows —"Clause 7 Here the testator intends to create a secret trust, but having regard to the provisions of the Hindu Wills Act read with the Indian Trusts Act, it is clear that no effect can be given to it, and as no beneficial interest is given to executor No 1 the whole of that gift fails and falls into the residue'

Bayabai making her five children as the children of Gokuldas party-plaintiffs filed this suit against the five executors and executrix on the 27th September 1912, praying, *inter alia*, that the defendant Haridas might be ordered to disclose the secret trust under cl 7, that the bequest in cl 7 might be declared to be for the benefit of the plaintiff and that the defendants should be ordered to pay such maintenance including arrears to the first plaintiff for herself and her children as the Court might think fit

Defendants 3 and 4 filed their written statement In cl 4 they refer to the judgment in Suit No 24 of 1911 and contend that the question of cl 7 being effective was *res judicata* They admit that they had been informed by defendants that the person for whose benefit provision in cl 7 was intended was the first plaintiff

Thereafter Gangabai was made a party-defendant as well as various other parties who took benefits under the will Gangabai filed a written statement in which

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BALABAI SAKALKAR v. HARIDAS RANCHHORDAS

she contended that the decree in Suit No 24 of 1911 was binding on the first plaintiff and that in any event the first plaintiff was not entitled to be paid more than Rs 15 a month as maintenance which had been offered to her

The other defendants did not appear at the hearing After the pleadings had been read, plaintiffs' counsel asked that plaintiffs 5 and 6 might be struck off, since they had no claim being daughters As it was obvious there was a misjoinder of causes of action and of parties he also asked for leave to withdraw the suit on behalf of plaintiffs 2 to 4 with liberty to file a fresh suit for maintenance, and for leave to withdraw such part of the first plaintiff's suit as referred to in the claim for maintenance with liberty to file a fresh suit I ordered that plaintiffs 5 and 6 should be struck off, and also plaintiffs 2 to 4 with liberty to file a fresh suit, while first plaintiff should be allowed to continue the suit in respect of prayers (*a*) and (*b*) of the plaint with liberty to file a fresh suit for her *maintenance The first plaintiff* was directed to pay the costs of defendants 3 and 4 and defendant 6 incurred by them in preparing to resist the claim for maintenance, unless a suit was filed in respect of that claim within three months from that date (the *6th August) in which case the same materials would be* available

If necessary, the consequential amendments in the plaint could be made

The following issues were then raised —

1 Whether the claim made by the plaintiff in paras 3 and 4 of the plaint with reference to the sum of Rs 5,000 and the shares in Tata Steel Co, is not *res judicata* by reason of the decision in Suit No 24 of 1911

2 Whether in any event the plaintiff is entitled to the said claim

3. Whether these defendants are not entitled to the decree on their counter-claim.

As regards issue 3 plaintiffs' counsel admitted he could not return the share certificate referred to in the counter-claim.

As regards the first issue as the plaintiff was not a party to Suit No. 24 of 1911, the decision would only be binding on her if she were claiming under the executors. It was urged that executors represent the beneficiaries, but the defendants certainly did not represent Bayabai as no mention whatever was made of her name. Nor does she claim under them as her case is founded on a contract made by Haridas with the testator. Moreover, the question I have now to decide was not raised in the suit, namely, whether if there was a trust in favour of Bayabai she could come in and prove it. I, therefore, find that she is not bound by the decision in Suit No. 24 of 1911.

The evidence of Haridas now makes it clear that the testator was desirous of making a bequest in favour of Bayabai but was not willing for her name to appear in the will. He therefore, dictated cl. 7 as it stands and told Haridas in private that the bequest was for the benefit of the lady at Kandewady.

Haridas knew to whom the testator referred although he did not know her name until afterwards. On one occasion he had gone with the testator to the house in which Bayabai lived and the testator pointed her out to him. In answer to my questions Haridas said that the testator understood that witness was willing to abide by his wishes, and he was quite willing to pay the plaintiff if the legacy was paid to him.

The bequests in cl. 7 are two:—

1. Rs. 5,000 to be recovered from the life-policy were to be given to Haridas to whom the testator was going to give directions in private.

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BAYABAI SAKALKAR v. HARIDAS RANCHHORDAS

The shares in Tata & Co were to be transferred to the name of such person as Haridas might name

The question arises whether the evidence of Haridas as to the private instructions given to him by the testator is admissible

It was argued that section 68 of the Indian Succession Act which is incorporated in the Hindu Wills Act by section 2 of that Act applied, but this is not a case of ambiguity or deficiency on the face of the will

If the testator had made no mention of his private instructions, and had merely made bequest of the Rs 5,000 to Haridas I do not think it can be doubted that the terms of the trust which he had undertaken could be proved

The question was very fully gone into in *Manuel Louis Kunha* v *Jnana Coelho* [1], where it was held that the rule of equity that a legatee who undertakes to carry out the wishes of the testator will be treated as a trustee and compelled to carry out the instructions of the testator was made applicable to India by section 5 of the Indian Trusts Act

But it was argued that the case is different if it appears on the face of the will that the legatee is not intended to take any beneficial interest, because there is an ambiguity or deficiency on the face of the will and therefore extrinsic evidence of the testator's intention is not admissible

The cases of *In re Fleetwood*[2] and *In re Huxtable*[3] show that where there is a bequest to A to be dealt with by him in accordance with directions given to him by the testator, the Courts have not considered that there is an ambiguity or deficiency on the face of the will so as to exclude oral evidence of the instructions

(1) (1908) 31 Mad. 187 (2) (1880) 15 Ch. D 594

(3) [1902] 2 Ch. 793

given All that is required is that the instructions were communicated to the legatee by the testator and that the legatee agreed to accept the bequest on the terms of the trust The consent of the legatee is implied if by his silence he leads the testator to believe that he will abide by the instructions communicated to him

In *In re Fleetwood*[1] Hall V C said (p 607) "The same principle which led this Court whether wisely or not, to hold that the *Statute of Frauds* and the *Statute of Wills* were not to be used as instruments of fraud, appears to me to apply to cases where the will shews some trust was intended, as well as to those where this does not appear upon it"

In *In re Huxtable*[2] A bequeathed 4000*l* to C "for the charitable purposes agreed upon between us" and it was held by the Court of Appeal that there was a gift for limited charitable purposes, and that evidence was admissible to shew what the purposes agreed upon were It was admitted for proving matters which were not defined by the will

In *Riordan* v *Banon*[3] the facts were practically on all fours with the present case The will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone should be cognizant It was proved by parol evidence that before execution of the will the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person he then named and that the legatee had consented to accept the legacy for that purpose The residuary legatee having claimed the benefit of the legacy it was held that a valid trust for the person named had attached to the bequest and the Court would allow such trust to be proved by parol evidence

(1) (1880) 15 Ch D 594 (2) [1902] 2 Ch 793
(3) (1876) 10 Ir R Eq 469

1914

BAYABAI SAKALKAR v. HARIDAS RANCHHODDAS

I can see no reason why this rule of equity should not be applied in India both when it appears on the face of the will that instructions have been given to the legatee and *when it does not so appear* In *the latter* case equity interferes to prevent a fraud by the legatee, in the former, to prevent a fraud by the residuary legatee The objection is the same in each case, viz, that the testator's intentions have not been expressed in accordance with the provisions of the law applicable to wills

The bequest of the shares in Tata & Co stands on a different footing The testator directed that his executor should transfer them to such person as Haridas might name But for the context those words would give Haridas a general power to name any one he pleased as the transferee Read with the first part of *cl 7 it is evident that the testator intended that the* shares should be transferred to the same person in whose favour a trust had been created as regards Rs 5,000

It has been argued that Haridas cannot be permitted to disclose the name of the person to whom the testator told him the shares should be transferred and that, therefore, the shares fall into the residue, on the ground that there is an ambiguity or deficiency on the face of the will

Sections 67 and 68 of the Indian Succession Act embody the canon referred to by Jarman on Wills, 6th edition, at p 516 "The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of *patent* ambiguities, or those which appear upon the face of the will, and admits it in the case of *latent* ambiguities, or those which seem certain, for anything that appears upon the face of the will, but there is some collateral matter, out of the will, that breeds the ambiguity And this ambiguity being raised by parol evidence, may, it is said, be fairly

removed by the same means But upon [illegible] the maxim proves not to be an universal [illegible] the one hand, there are many recognized [illegible] the admission of parol evidence to explain [illegible] appearing on the face of the will, while [illegible] hand, the existence of a latent ambiguity will [illegible] not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used We come, therefore, to the conclusion either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as distinguished from the meaning of his written words) and that, consequently, if true its application must be confined to a special class of cases.

In *Colpoys* v *Colpoys*[1] still accepted as an authority, the Master of the Rolls said at p 464 *et seq* "The books are full of instances sanctioned by the highest authorities both in law and equity When the person or the thing is designated on the face of the instrument by terms imperfect and equivocal admitting either of no meaning at all by themselves or of a variety of different meanings referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent

But the question does not arise in this case whether under similar circumstances those authorities will be followed by the Courts in India for it seems to me that the evidence now under consideration has been adduced

(1) (1822) Jac 451

for the purpose of proving material facts, and not for proving what the testator meant to have written

In *Higgins* v *Dawson*[1] Lord Davey refers with approval to the following passage in the judgment of Rigby L J in the Court below "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, 3rd Edn pl 10) This distinction must never be lost sight of The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself " see also Wigram, p 51, and Jarman at p 511 says "Upon the same principle, of course, it is not essential to the validity of the gift, either of real or personal estate that the person who is the intended object of the testator s bounty should be actually pointed out on the face of the will, it is enough that the testator has provided the means of ascertaining it, according to the maxim, *id certum est quod certum reddi potest* Nor is it material that the description makes the objects of gift to depend upon circumstances or acts of persons which are future and contingent'

That a power can be created by a Hindu will was recognized by this Court in *Javerbai* v *Kablibai*[2] If the words of the second part of clause 7 are read by themselves Haridas has a general power to nominate the person to whom the shares should be transferred He could nominate himself or any person in existence at the date of the testator's death —But read with the words in the first part of the clause it is clear that the shares must be transferred to a person whose name was given by the testator to Haridas, and that the power is not a general one but a special one

(1) [1902] A C 1 at p 10 (2) (1890) 15 Bom 326

I think that Haridas was bound to disclose the plaintiff's name and that the evidence is admissible either under section 62 or in accordance with the authorities above cited

Attorneys for the plaintiff Messrs *Jehangir, Seervai, Minocheher and Hiralal*

Attorneys for the defendants Messrs *Edgelow, Gulabchand, Wadia & Co*, Messrs *Dastur & Co*, Messrs *Madhavji Kamdar and Chhotubhai*

Suit decreed

M F N

ORIGINAL CIVIL

Before Mr Justice Macleod

NISSIM ISAAC BEKHOR (PLAINTIFF) v HAJI SULTANALI SHASTARY & Co A FIRM (DEFENDANTS) * — 1915 *February 8*

Sale of goods—C I F Contract—Insurance of goods against war risk without buyer's instruction—Buyer not obliged to pay for such insurance—Payment against documents—Bill of lading must be tendered—Bill of lading what is a—War—Government proclamations prohibiting trading with the enemy—Effect of proclamations on contract goods shipped in enemy Port—Performance of contract becomes illegal

On the 9th June 1914 the defendants purchased from the plaintiff 5 tons round copper bottoms c i f Mahomerah July shipment and agreed to pay for the said copper in Bombay on being tendered the Bills of lading and other documents in respect thereof The copper was shipped on board the S S Tangistan on or about the 28th July 1914 and the plaintiff obtained relative Bills of lading and insured the goods against ordinary marine risks On the 5th August in consequence of war having broken out between Great Britain and Germany the plaintiff's agent in England although not instructed to do so by the defendants insured the copper against war risks and paid 10 per cent premium The documents arrived in Bombay on the 7th September whereupon the plaintiff tendered them to the defendants and demanded payment of the invoice price of the goods including the above mentioned extra premium of 10 per cent in respect of insurance against war risks The defendants refused to pay the amount demanded on the ground that they were not liable to pay the aforesaid extra premium

* O C J Suit No. 1509 of 1914

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NISSIM ISAAC BEKHOR v HAJI SULTANALI SHASTARY & Co

Held In the absence of express instructions from the defendants to effect insurance against war risks the defendants were not liable to pay the extra premium

By another contract dated 17th July 1914 the defendants purchased from the plaintiff 900 bags of sugar c i f Mahomerah July shipment and agreed to pay for the said sugar in Bombay on being tendered the Bills of lading and other documents in respect thereof The plaintiff got the sugar shipped at Hamburg on the S S Nicomedia on the 28th July 1914 and obtained as he alleged relative Bills of lading in respect thereof and he insured the goods Subsequently after the documents relating to the said sugar had arrived in Bombay the plaintiff presented them to the defendants and demanded payment but the defendants refused to accept the documents or to pay the money on the grounds firstly that by reason of the state of war which existed and the Government proclamations prohibiting trade with the enemy performance of the contract would be impossible and secondly that the documents which the plaintiff presented as Bills of lading were not Bills of lading and were not therefore the proper documents to be tendered in accordance with the terms of a c i f contract

Held that in view of the Government proclamations the tender of the shipping documents was not a valid tender and that acceptance of and payment against the said documents would be a violation of the said proclamation

Duncan Fox & Co v *Schrempft & Bonke* [1] followed

Held also that a Bill of lading as known to merchants is a receipt for goods actually delivered over and shipped on board the ship named therein and signed by the Captain or his representative and that the documents tendered to the defendants as Bills of lading were not Bills of lading but mere receipts for warehousing or shipment As such they were no evidence of any shipment and a purchaser under a c i f contract if tendered such a receipt would be entitled to ask for a Bill of lading for he is not obliged to pay upon proof merely that the goods had arrived at the port of departure

THE facts appear fully from his Lordship's judgment

Campbell and *Weldon* for the plaintiff

Inverarity and *Setalvad* for the defendants

MACLEOD, J —On the 9th of June 1914, the defendant-firm, carrying on business in Bombay, purchased from the plaintiff, a merchant, also carrying on business in Bombay, five tons round copper bottoms, c i f Mahomerah, July shipment, by a contract in writing at the price and on the terms mentioned in the said contract

(1) [1915] 1 K B 365

The defendants agreed to pay for the copper in Bombay against Bills of lading. The copper was shipped on board the steamer Tangistan on or about the 28th day of July 1914 and the plaintiff says he obtained the relative Bills of lading and also insured the copper against the ordinary marine risks. On the 5th day of August, in consequence of war having broken out between Great Britain and Germany the plaintiff's agent in England insured the copper against war risks and paid 10 per cent premium for such insurance. The documents arrived in Bombay on the 7th of September, whereupon the plaintiff delivered three invoices for the copper to the defendants and called upon them to pay the invoice price and also the aforesaid premium for insurance against war risks. The defendants refused to pay the amount demanded on the ground that they were not liable to pay the aforesaid premium. By another contract in writing, dated the 17th July 1914, the defendants purchased from the plaintiff 900 bags of sugar, c.i.f. Mahomerah, July shipment, at the price and on the terms mentioned in the said contract. The defendants also agreed to pay for the sugar in Bombay against the Bills of lading. The plaintiff alleges that, in performance of the contract, he got the sugar shipped at Hamburg on board the steamer Nicomedia on the 28th of July 1914 and obtained the relative Bills of lading and also insured the sugar against the ordinary marine risks. On the 29th of July, his agent in England insured the sugar against war risks and paid half per cent premium for such insurance. He further alleges that the Bills of lading relating to the sugar arrived in Bombay on the 15th day of August. Thereupon, he delivered to the defendants an invoice of the sugar and called upon them to pay the sum of Rs. 19,251-15-3, being the price of the sugar inclusive of the aforesaid premium for insurance against war risks. He further alleges that he has tendered the

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NISSIM ISAAC BEKHOR v HAJI SULTANALI SHASTARY & Co

Held In the absence of express instructions from the defendants to effect insurance against war risks the defendants were not liable to pay the extra premium

By another contract dated 17th July 1914 the defendants purchased from the plaintiff 900 bags of sugar c i f Mahomerah July shipment and agreed to pay for the said sugar in Bombay on being tendered the Bills of lading and other documents in respect thereof The plaintiff got the sugar shipped at Hamburg on the S S Nicomedia on the 28th July 1914 and obtained as he alleged relative Bills of lading in respect thereof and he insured the goods Subsequently after the documents relating to the said sugar had arrived in Bombay the plaintiff presented them to the defendants and demanded payment but the defendants refused to accept the documents or to pay the money on the grounds firstly that by reason of the state of war which existed and the Government proclamations prohibiting trade with the enemy performance of the contract would be impossible and secondly that the documents which the plaintiff presented as Bills of lading were not Bills of lading and were not therefore the proper documents to be tendered in accordance with the terms of a c i f contract

Held that in view of the Government proclamations the tender of the shipping documents was not a valid tender and that acceptance of and payment against the said documents would be a violation of the said proclamation

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Held, also that a Bill of lading as known to merchants is a receipt for goods actually delivered over and shipped on board the ship named therein and signed by the Captain or his representative and that the documents tendered to the defendants as Bills of lading were not Bills of lading but mere receipts for warehousing or shipment As such they were no evidence of any shipment and a purchaser under a c i f contract if tendered such a receipt would be entitled to ask for a Bill of lading for he is not obliged to pay upon proof merely that the goods had arrived at the port of departure

THE facts appear fully from his Lordship's judgment

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(1) [1915] 1 K B 365

The defendants agreed to pay for the copper in Bombay against Bills of lading The copper was shipped on board the steamer Tangistan on or about the 28th day of July 1914, and the plaintiff says he obtained the relative Bills of lading and also insured the copper against the ordinary marine risks On the 5th day of August, in consequence of war having broken out between Great Britain and Germany, the plaintiff's agent in England insured the copper against war risks and paid 10 per cent premium for such insurance The documents arrived in Bombay on the 7th of September whereupon the plaintiff delivered three invoices for the copper to the defendants and called upon them to pay the invoice price and also the aforesaid premium for insurance against war risks The defendants refused to pay the amount demanded on the ground that they were not liable to pay the aforesaid premium By another contract in writing, dated the 17th July 1914, the defendants purchased from the plaintiff 900 bags of sugar, c i f Mahomerah, July shipment, at the price and on the terms mentioned in the said contract The defendants also agreed to pay for the sugar in Bombay against the Bills of lading The plaintiff alleges that, in performance of the contract, he got the sugar shipped at Hamburg on board the steamer Nicomedia on the 28th of July 1914 and obtained the relative Bills of lading and also insured the sugar against the ordinary marine risks On the 29th of July, his agent in England insured the sugar against war risks and paid half per cent premium for such insurance He further alleges that the Bills of lading relating to the sugar arrived in Bombay on the 15th day of August Thereupon he delivered to the defendants an invoice of the sugar and called upon them to pay the sum of Rs 19,251-15-3, being the price of the sugar inclusive of the aforesaid premium for insurance against war risks He further alleges that he has tendered the

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NISSIM ISAAC BEKHOR v. HAJI SULTANALI SHASTARY & Co

Bills of lading for the sugar and the policy of insurance against war risks to the defendants, but they have failed to pay the amount claimed Accordingly, he asks *for a decree in this suit for the sum of* Rs 8,878-4 11, being the price of the copper with interest at 9 per cent from the 7th of September, 1914, and the sum of Rs 19,251 15 3, being the price of the sugar with interest at 9 per cent from the 22nd of August 1914

The defendants in their written statement deny that they were liable to pay the 10 per cent premium for insurance of the copper against war risks As a matter of fact, since the suit was filed, the defendants have paid the whole of the plaintiff's claim in respect of the copper without prejudice to their contentions in this suit in order to get delivery of the copper, and if their contentions are correct they will be entitled *to a refund of the amount paid for the insurance* against war risks With regard to the sugar the defendants do not admit that the plaintiff got the sugar shipped at Hamburg on the 28th of July or that the plaintiff obtained the relative Bills of lading in respect of such shipment Finally, they contend that, in view of the war and the proclamations that have been issued from time to time by the British Government, the contract between the parties has become impossible of performance

Exhibits A and B are the contracts for the purchase of copper and sugar respectively They are what are called c i f contracts under which the purchaser is bound to pay the stated price for the goods on tender of the documents showing that the goods have been shipped for transit to the port of destination, duly insured according to the terms of the contract, and that freight has been paid I think it is clear that under these contracts the seller was not bound to insure against

war risks This was admitted by de... and by the plaintiff in his circul... addressed to his constituents (L D... their attention to the necessit... indented through him against w... political situation in Europe He... note that if he did not receive... 6 p m, he would effect the nec... war risks on their sugar and deb... premiums Without receiving... the defendants the plaintiff cable... agent in England to effect insura... and I find that he was not m... defendants with extra premium... express instructions from them... fact were not given The su... Ex B was insured against... premium but it appears no... such insurance was that the s... before the 1st August The cop... Ex A was not insured until... owing to war having been... Britain and Germany, 10 ... charged by the under-writer

15

Isaac

Haji

Tasali

Stary

Co

The invoices for the copper... sent to the defendants on th... the 9th September they wrote... you sent your invoices No ... ment of copper by SS Jan... extra insurance and we are... have put such extra amount... have never informed us that... copper against war risks ... time of the invoices We... you accordingly as soon a... consignments have been reall... ...d ...s ...it ...nt ...d pro- ...nts ...ll of ...ound

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and are in course of transit " This might be construed as a consent on the part of the defendants to pay the 10 per cent on being satisfied that the *goods* had been shipped, but the plaintiff's letter of the 10th shows that the plaintiff did not consider that the defendants had agreed to pay the 10 per cent and in their letter of the 11th September the defendants definitely disclaim all liability for extra insurance It was contended that the case fell within section 70 of the Indian Contract Act, but I do not think it does The cases cited were cases in which a mortgagee was held entitled to charge his mortgagor for sums paid by him for land revenue to avoid the mortgaged land being sold for *non-payment* The analogy would only hold good if the Tangistan had been captured and the defendants had claimed the benefit of the insurance against war risks On the 21st October the defendants wrote that it had been mutually agreed that plaintiff was to charge 10 per cent for war risks on goods shipped per SS Tangistan but plaintiff denied this in his solicitors' letter of the 28th October It is evident that the defendants were perfectly willing, on a concession, to pay 10 per cent but this was not accepted by the plaintiff, and it is impossible to find any substantial ground for the contentions in their letter of the 28th October that the defendants were bound to pay whatever premium the plaintiff might have paid on their behalf for the copper

I find, therefore, that the defendants are entitled to a refund of what they have paid to the plaintiff for the insurance effected by him against war risks, in order that they might get delivery of the copper

The next question is whether the defendants were entitled to refuse payment of the invoice amount of the sugar

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It is admitted that the invoice (Ex K) was delivered at the defendants office by the plaintiff's clerk Saul on the 15th August on which day the English Mail arrived

The invoice value was Rs 19,146 3 3 to which was added Rs 423 approximate insurance against war risks pending the arrival of policy from London It is admitted that Rs 423 was far in excess of what had been paid by the plaintiff s agent in London, and, therefore, in any event, the defendants were asked to pay more than what was due, but further there is a conflict of evidence as to whether the shipping documents were tendered on the 15th August and I am satisfied that no such tender was made The plaint carefully refrains from alleging they were, nor is any such suggestion made in the correspondence until the 16th November

I do not believe the witness Saul who said that he tendered shipping documents to the defendants' Moonim together with the invoice on the 15th August The documents were sent to the National Bank and it would be most unlikly that the plaintiff received them from the Bank on the same day that they arrived from England and this is supported by the plaintiff entering in his Bill-book the bill drawn against the sugar on the 18th August It seems clear that the usual practice of the plaintiff was to send the invoices to his constituents, to inform them what was the amount payable, the documents thereafter either being sent with a covering letter, see Ex 8, or being delivered over on payment of the invoice value

But assuming that the shipping documents now produced in Court were actually tendered to the defendants on the 15th August was there amongst them a Bill of lading against which only the defendants were bound

to make payment? Ex H collectively are the documents relating to the 900 bags of sugar issued by the Hamburg American Line which the plaintiff contends are Bills of lading The writing on the face of the document is in German On the back general rules are printed in German and English

Each document which was issued in triplicate purports to be a receipt for the goods named therein from Messrs Cohre and Amme for transport by the German steamer, Nicomedia, Captain—or subsequent steamer *through the Suez Canal for Mohammerah to order or* to be delivered to the order of— I see no reason to doubt that the plaintiff has frequently received documents in a similar form purporting to be Bills of lading which he has handed over to his indentors and that, on presentation of such documents, the indentors have obtained delivery from the shipowners of the relative goods and that, therefore such documents have performed the ordinary functions of Bills of lading But it is indisputable that a Bill of lading, as known to merchants, is a receipt for goods actually delivered over and shipped on board the ship named therein signed by the Captain of the steamer or his representative, and no document which does not conform to these conditions can strictly be called a Bill of lading It may be that, as a matter of convenience, ship-owners may issue to shippers receipts in triplicate for goods delivered at the warehouse for shipment, such receipts being accepted by the shippers in place of Bills of lading, forwarded to the consignee and accepted by the ship owners agents at the port of delivery as entitling the consignee to delivery and under ordinary circumstances no dispute would arise But the fact remains that these receipts are not evidence of shipment and if such a receipt is tendered to a c i f purchaser he is entitled to ask for a Bill of lading, for he is not bound

to pay upon proof merely that the goods have arrived at the port of departure It has been contended that, under the contract in this case, the purchaser has agreed to accept the date of the carriers' or wharfingers' receipt as the date of shipment, and that, therefore, he is not entitled to say that the goods were not shipped on the 28th July, the date on which the documents (Ex H) were issued But that agreement is contained in the clause which absolves the seller from responsibility for late or non-arrival of the goods under certain circumstances and declares that the period during which such stoppage as is therein described continues shall not be considered to form part of the time mentioned in the contract for the completion thereof Therefore, the sugar, having been received by the carriers at Hamburg on the 28th July, the purchaser could not contend that it was not July shipment, but the seller was not absolved from his obligation to tender a Bill of lading If a Bill of lading had been tendered the purchaser would have been bound to pay the invoice value, though he would be still entitled to claim a refund if he could prove that, as a matter of fact, although the Bill of lading had been issued, the goods had not been shipped

The defendants before the hearing, took out a summons for the issue of a commission to examine witnesses in London Dunkirk and Hamburg in order to prove that the Nicomedia left Dunkirk on the 30th July and arrived at Hamburg on or about the 31st July, but I do not think that they were entitled in this suit to ask for such a commission as the question whether the goods had been shipped could only be relevant in a suit to be filed by the defendants

Mr Inverarity produced certain copies of Lloyd's Weekly Index which showed that, according to the information received at Lloyds from their agents the

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The defendants, before the hearing, took out a summons for the issue of a commission to examine witnesses in London, Dunkirk and Hamburg in order to prove that the Nicomedia left Dunkirk on the 30th July and arrived at Hamburg on or about the 31st July, but I do not think that they were entitled in this suit to ask for such a commission as the question whether the goods had been shipped could only be relevant in a suit to be filed by the defendants.

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Nicomedia left Dunkirk on the 30th July, arrived at Hamburg on or about the 31st July and was still there in November He admitted that the information contained in the Weekly Index was not evidence but it seems unfortunate that in a Court dealing with commercial cases it should not be permissible to rely on such a publication which is treated by business men as affording reliable information regarding the movements of ships on Lloyd's Register and that it should be necessary in order to prove where a ship was on a particular date to produce evidence of witnesses who had actually seen the ship A special list for commercial causes was instituted so as to induce the confidence of the commercial world that their disputes would be adjudicated upon expeditiously and in accordence with the Law Merchant The law of evidence has always been the despair of the business man and apart from the fact that a commercial cause is set down for hearing as soon as possible after the issue of the summons and takes precedence of other causes, there is little to be gained if a party is exposed to the ordinary delays of the law

It is certainly desirable that a Judge trying a commercial cause should have a power to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence or otherwise

The last question is whether if the Bills of lading had been tendered, that would have amounted to a valid tender having regard to the Proclamation issued by the British Government on the 5th August and published in the *Bombay Government Gazette*, on the 10th August (Ex 9)

All persons resident carrying on business or being in British Dominions are warned not to supply to or

obtain from the German Empire any goods, wares or merchandise or supply to or obtain the same from any person resident carrying on business or being therein nor to supply to or obtain from any person any goods wares, or merchandise for or by any way of transmission to or from the German Empire or to or from any person resident carrying on business or being therein nor to trade in or carry any goods, wares or merchandise destined for or coming from the German Empire or for or from any person resident carrying on business or being therein.

It is difficult to see how the acceptance of the shipping documents relating to the sugar by the defendants would be considered as not being a violation of this Proclamation.

In *Duncan, Fox & Co. v. Schrempft & Bonke*[1] the plaintiff had sold Chilian honey per steamer c.i.f. to Hamburg. The honey was shipped on a German steamer and on the 5th August what was admitted as a tender of the shipping documents was made. The defendants refused to accept the tender. On a special case stated by arbitrators it was held that such refusal was justified because by accepting the tender and obtaining the gooods the defendants would be carrying out a contract in violation of the proclamation against trading with the enemy. It seems that this decision must cover a case of goods coming from Germany.

The suit must be dismissed with costs, each party to pay his own costs of the summons for commission.

Defendants to be entitled to a refund of the amount paid for the 10 per cent. premium and interest, if any, with interest at 6 per cent. from date of payment.

Solicitors for the plaintiff: Messrs. *Judah & Soloman*.

[1] [1915] 1 K. B. 365.

1915 Solicitors for the defendants Messis *Matubhai, Jameti am & Madan*

Nissim Isaac Bekhor v Haji Sultanali Shastary & Co

Suit dismissed

M F N

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

1915 ACHUT RAYAPA SHANBAG (ORIGINAL DEFENDANT) APPELLANT v GOPAL SUBBAYA SHANBAG (ORIGINAL PLAINTIFF) RESPONDENT*

June 30

Limitation Act (IX of 1908) Schedule I articles 92 93—Suit to declare the forgery of an instrument—Attempt—Lease—Attempt to record a lease under the Record of Rights Act (Bom Act IV of 1903) is not an attempt to enforce

The defendant applied to the Mamlatdar to record under the Record of Rights Act 1903 a lease under which he claimed to be entitled to a rent of 400 cocoanuts from the plaintiff The application was made on the 4th August 1908 but the plaintiff having complained that the document was a forgery the Mamlatdar declined to record it The defendant then applied to the Collector who on the 11th August 1909 ordered that the lease should be recorded On the strength of the record the defendant sued in the Mamlatdar s Court for the enforcement of the terms of the lease and recovered in April and July 1912 cocoanuts of the value of upwards of Rs 40 Within three years of the recovery of these cocoanuts the plaintiff brought the suit to recover back the value of the cocoanuts on the footing of the alleged lease being a forgery The defendant contended that the suit was barred under article 93 of the Limitation Act on the ground that it was filed more than three years after the 4th August 1908 the date of an attempt to enforce it against the plaintiff

Held that the suit was not barred under article 93 of the Limitation Act 1908 as the first real attempt to enforce the lease took place when the defendant attempted to recover the rent under the lease and that attempt was made within three years of the institution of the suit The attempt to get the lease recorded under the Record of Rights Act could not be put higher than an unsuccessful attempt to have a document registered in a case in which registration was necessary (art 92) and that such an attempt was not an attempt to enforce the lease

* Appeal from Order No 59 of 1914

SECOND appeal against the decision of C. V. Vernon, District Judge, Karwar, reversing the decree passed by J. A. Saldanha, Subordinate Judge at Kumta.

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ACHUT RAYAPA v. GOPAL SUBBAYA.

Suit for declaration.

The plaintiff's family held certain lands on mulgeni lease. The defendant claimed to be the lessor of the lands under a lease (*edu nudi*) executed by Narsinva (a brother of the plaintiff) and under which he was to receive 400 coconuts as rent every year. On the 4th August 1908 the defendant applied to the Mamlatdar to have the lease recorded under the Record of Rights Act (Bom. Act IV of 1903). The plaintiff complained that the document was a forgery and the Mamlatdar declined to record it. The defendant having appealed, the Collector ordered the lease to be recorded on the 11th August 1909. On the strength of the said deed the defendant recovered from the plaintiff in April 1912 through village officers, 400 coconuts as rent for the year 1910-11, and in July of the same year recovered another 100 coconuts as rent for the year 1911-12. The plaintiff therefore, on the 6th August 1912 filed the present suit to obtain a declaration that the defendant had no *nadgi* right over the land and that the plaintiff was not a lessee of the defendant, and to recover Rs. 12-8-0 the value of the coconuts. The defendant contended *inter alia* that the suit was barred by limitation.

The Subordinate Judge held that the attempt to record the lease in the Record of Rights was an 'attempt to enforce' and therefore dismissed the suit on a preliminary ground that it was barred under articles 92 and 93 of the Limitation Act, 1908.

On appeal the District Judge reversed the decree and remanded the suit to the first Court for trial on

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merits, holding that the suit was not barred, on the following grounds —

The lower Court has held that the suit is time barred under articles 92 and 93 of the first schedule to the Indian Limitation Act The suit is for a declaration that the defendant s family has no *nadgi* rights in plaintiff s mulgeni lands Articles 92 and 93 relate to suits to declare the forgery of an instrument Assuming for the sake of argument that this is such a suit limitation runs from the date of ' issue or attempt to enforce the instrument The lower Court has held that mere presentation for entry in the Record of Rights is an attempt to enforce ' I am of opinion that the first real attempt to enforce was when defendant filed his rent suit No 9 of 1909 It has not been shown that three years have elapsed since that suit was filed and the actual decree in defendant s favour in that suit is dated 11th August 1909

I am also of opinion that this is not a suit to declare the forgery of an instrument Plaintiff is in possession and this fact materially differentiates the present suit from there cited in which the party sued is in possession under colour of an instrument In the latter case it is necessary to get the instrument set aside In the present case all that plaintiff need sue for is a declaration it will be for the defendant to prove his alleged *nadgi* lease in reply

As to the meaning of issue in article 92 see *Hurri Bhusan* v *Upendra Lal* I L R 24 Cal p 1 from which it would appear that article 92 is in no way applicable to the present case

S M Kaikini for the appellant —I contend that the plaintiff s suit was in effect for a declaration that the rent note (Ex 23) was a forged document and the suit was, therefore, governed either by article 92 or 93 of the Limitation Act In either case limitation began to run from the 4th August 1908 when this rent note was produced before the Mamlatdar It was the date of ' issue ' under article 92 and it was also the date of ' the attempt to enforce ' the instrument Both these words mean to publish Attempting to enforce means asserting one s rights or seeking to place oneself in an advantageous position which but for the instrument one could not occupy See *Fakharooddeen Mahomed*

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ACHUT RAYAPA v. GOLAI SUBBAYA

Ahsan v *Pogose*(1) which is confirmed by the Privy Council case of *Fakharuddin Mahomed Ahsan* v *Official Trustee of Bengal* (2)

Under section 135 (j) of the Land Revenue Code, the entry in the Record of Rights should be held true between the parties, that is, it is final between the parties unless it was altered by an appeal to the superior authorities or by a decision of a Civil Court

Nilkanth Atmaram for the respondent —The attempt referred to under article 93 of the Limitation Act is a successful attempt Until the attempt is successful and the defendant gets an advantageous position no cause of action arises to the plaintiff If there was no entry made in the Record of Rights the plaintiff had no cause to pray for any relief before the Courts it was only after the entry was made that the plaintiff's position became insecure and he was forced to ask for the present relief in the Civil Court This view was supported by the ruling of the Privy Council in the case of *Fakharuddin Mahomed Ahsan* v *Official Trustee of Bengal* (2)

The term 'issue' does not apply to documents of the present kind it was used only as regards documents familiar in business to which that term is usually applied *Huri Bhusan Mukerji* v *Upendra Lal Mukerji* (3)

Kaikini, in reply —The Limitation Act itself lays down that time from which limitation begins to run is the date of the attempt A successful attempt would not be called an attempt It is the first step towards any act that is called an attempt Even in the case of *Fakharooddeen Mahomed Ahsan* v *Pogose*(1) their

(1) (1878) 4 Cal 209 (2) (1881) 8 Cal 178

(3) (1896) 24 Cal 1

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GOPAL SUBBAYA

Lordships call the application made by Mr Pogose an attempt In that particular case it did not matter whether limitation was calculated from the date of the application or the granting of that application To bring the suit under article 93 of the Limitation Act, the plaintiff ought to have brought the suit within three years from the date of the attempt as that was the date from which limitation began to run

SCOTT, C J —The defendant in this case, who is now the appellant, applied to the Mamlatdar of the District in which the land in suit is situate for record under the Record of Rights Act of a lease under which he claimed to be entitled to a rent of 400 cocoanuts That application was made in or about the beginning of August 1908 and upon notice being given to the respondent-plaintiff, who was the alleged lessee, the plaintiff complained that the document was a forgery The Mamlatdar thereupon, declined to record it and returned it to the applicant The applicant was not satisfied and applied to the Collector to have the document recorded That application was not disposed of until the following year, and on the 11th of August 1909, the Collector ordered that the lease should be recorded, and from that date it was recorded in the Record of Rights in effect that the defendant was the landlord of the plaintiff On the strength of that record, the defendant sued in the Mamlatdar's Court for enforcement of the terms of the alleged lease and recovered on various occasions cocoanuts of the value of upwards Rs 40 Within three years of the recovery of those cocoanuts the plaintiff brought this suit to recover back the value on the footing of the alleged lease being a forgery It is contended that the suit is barred under article 93 of the Indian Limitation Act, on the ground that it is filed more than three years after the date of an attempt to enforce it against the plaintiff Now the attempt

to enforce it for the purpose of recovering the rent under it was made well within three years So the appellant is driven to the contention that an attempt took place at an earlier date

The attempt to have it recorded under the Record of Rights, which is relied upon was made in August 1908 and failed, and it is contended that although the plaintiff had nothing to fear for upwards of a year owing to the success of his contentions before the Mamlatdar, he nevertheless ought to have sued to have that instrument declared to be a forgery It appears to us that an attempt, such as that made by the defendant to have the instrument recorded under the Record of Rights Act, cannot be put higher than an attempt to have a document registered in a case in which registration is necessary and the particular attempt relied on in the present case cannot be put higher than an unsuccessful attempt to register Now cases of registration of forged documents, or documents which the plaintiff contends are forged, are dealt with by article 92, and limitation for the purpose of a suit to declare the forgery of the instrument runs from the date when the registration, not the attempted registration, becomes known to the plaintiff We do not think that it can be contended that an attempt to register is an attempt to enforce otherwise there would be no object in a special Article with reference to issue and registration as distinct from the Article relating to attempts to enforce and if registration is not an attempt to enforce it is clear, we think that the attempt to record is not an attempt to enforce In their ordinary and natural meaning the words "attempt to enforce" would be applicable to an attempt to recover rent under a lease and the first attempt of that kind took place within three years of the institution of the suit We are therefore, of opinion that the suit is

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within time We affirm the order of the lower appellate Court and dismiss the appeal with costs

Order affirmed

J G R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

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July 5

USMANMIYA ABDULLAMIYA AND ANOTHER (ORIGINAL DEFENDANTS NOS 1 AND 2) APPELLANTS v VALLI MAHOMED HUSAINBHAI AND ANOTHER (ORIGINAL DEFENDANTS NO 3 AND PLAINTIFF) RESPONDENTS [*]

Mahomedan law—Acknowledgment of son—Acknowledgment of legitimate sonship—Inference of acknowledgment

A Mahomedan cannot legally acknowledge as his son a person who is shown to be the son of another man The acknowledgment must be not merely of sonship but of legitimate sonship but the fact that the acknowledgment was of legitimacy as well as of sonship may be inferred from circumstances justifying that inference

SECOND appeal from the decision of B C Kennedy, District Judge of Ahmedabad confirming the decree passed by K K Sunavala Additional Subordinate Judge at Ahmedabad

Suit to recover possession of certain share in property left by one Husainbhai The plaintiff Sardarbibi claimed to be his wife defendants Nos 1 and 2 were his brothers and defendant No 3 claimed to be his acknowledged son

The plaintiff alleged that as widow of the deceased, her share was one-fourth She denied that defendant No 3 was the acknowledged son of the deceased Defendants Nos 1 and 2 supported the denial

[*] Second Appeal No 494 of 1912

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v
VALLI
MAHOMED

The Suboidinate Judge held that the plaintiff was the widow of the deceased, that defendant No 3 was his acknowledged son, that the share of the plaintiff was one-eighth and that defendants Nos 1 and 2 were not entitled to any shares

On appeal, this decree was confirmed by the District Judge The learned Judge held that defendant No 3 was validly acknowledged as a son by the deceased, on the following grounds —

As for the third point it is of course the case that a Musalman cannot by acknowledgment make a person his son whom he knows not to be his son The acknowledgment must be the expression by the acknowledger of an actual paternity which he believes to exist The permission to acknowledge is really due to the prevalence in Musalman households of old times of female slaves taken in war The owner would use them as concubines but they were not veiled and guarded like wives and might consequently become mother by fellow slaves or friends of the house If the master really believed that a certain child was his by such a woman he might acknowledge it and this acknowledgment gave the slave a higher position (Umm Walid) In some of the reigning houses there is no marriage and it is by this kind of descent alone that the succession is maintained But it appears that in mordern times the right of acknowledgment is somewhat extended and that a person can acknowledge another as his son and that such acknowledgment may not be questioned as long as the acknowledgee is *Majhul ul nasab* i e one whose descent is unknown Nasab is generally though not absolutely exclusively confined to paternal descent on the other hand a man is prohibited from acknowledging a man as his son even though the son acknowledged is certainly the begotten of the assertor in case the intercourse which led to the son's conception was such as would expose the father to the penalty of the *hadd* Such intercourse is called *zina* and is best translated by whoredom

It would seem then that a person can acknowledge another to be his son if the acknowledgee's paternity is unknown or if the paternity be known to be in the acknowledger provided the acknowledged is not an *Ibn u zina* In the present case the origin both paternal and maternal of the defendant 3 is absolutely unknown he himself is in considerable doubts as to his origin, but he has clearly acknowledged Hussainmiya as his father His uncle defendant 1 also profess entire ignorance as to the origin of the defendant 3 The disqualification *zina* is therefore absent and the qualification unknown descent and congruity of years present I think then the acknowledgment is good and that defendant 3 must be held to be the son of Hussainmiya.

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USMANMIYA v. VALLI MAHOMED

Defendants Nos 1 and 2 appealed to the High Court

G S Rao, for the appellants—In this case the deceased himself admitted in his deed of gift (Ex 142) that the parents of respondent No 1 had died leaving him about twenty days old Thus the deceased could not acknowledge the respondent No 1, who was shown to be a son of other parents Hamilton's Hedaya, p 439, Baillie's Digest, Vol I, p 408, Amir Ali, p 252, *Mussamut Jaibun* v *Mussamut Bibee Nujeeboonissa*[1] and *Muhammad Allahdad Khan* v *Muhammad Ismail Khan*[2] Further, under the Mahomedan Law, mere acknowledgment of sonship will not do, there must be an acknowledgment of *legitimate* sonship *Khajah Hidayut Oollah* v *Rai Jan Khanum*,[3] *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v *Hyder Hossein Khan*[4] *Sadakat Hossein* v *Mahomed Yusuf*[5] and *Abdul Razak* v *Aga Mahomed Jaffer Bindanim*[6]

K N Koyajee, for respondent No 1 —Here no *specific* person is shown to be the father of the acknowledged child, and thus the paternity of the child is doubtful see *Muhammad Allahdad Khan* v *Muhammad Ismail Khan*[7] Whether respondent No 1 is shown to have been the child of any particular person is a question of fact, which the lower Courts have decided in the negative in spite of the supposed admission in Ex 142

The Mahomedan Law does not require any express acknowledgment of legitimate sonship It is enough if there are acts and conduct showing recognition of a child as a son *Nawab Muhammad Azmat Ali Khan*

(1) (1869) 12 W R 497
(2) (1888) 10 All 289 at p 340
(3) (1844) 3 Moo I A 295
(4) (1866) 11 Moo I A 94 at p 115
(5) (1883) 10 Cal 663 at p 668
(6) (1893) 21 Cal 666
(7) (1888) 10 All 289 at p 317

Mussumat Lalli Begum[1] and *Sayad Walulla v. Miran Saheb*.[2] In *Abdul Razak's case*,[3] there was undoubted illegitimacy which necessitated an acknowledgment of legitimate sonship.

BATCHELOR, J.:—The suit out of which this appeal arises was brought by one Saidabibi as the widow of Husseinbhai Abdulabhai to recover possession of her one-fourth share of the deceased's property. Husseinbhai died in June 1904. He left no issue, but he left a widow, the present plaintiff and two brothers, the 1st and 2nd defendants. The 1st and 2nd defendants did not dispute the claim of the plaintiff but the 3rd defendant resisted the plaintiff's suit and claimed to be the acknowledged son of the deceased Husseinbhai. Both the lower Courts have acceded to the 3rd defendant's contention, and the present appeal is brought, not by the plaintiff, but by the 1st and 2nd defendants, who are represented before us by Mr. Rao.

The learned pleader for the appellants has taken two points in his clients' interests. The first of those points is that a Mahomedan cannot legally acknowledge as his son a person who is shown to be the son of another man. It appears to me that this legal proposition is well grounded, and among the numerous authorities which may be cited in its favour we may mention Hamilton's Hedaya at page 139, Sir Barnes Peacock's judgment in *Mussamut Jaibun v. Mussamut Bibee Nujeeboonissa*[4] and the elaborate judgments in *Muhammad Allahdad Khan v. Muhammad Ismail Khan*.[5]

But the question is whether in the present case the 3rd defendant is shown not to have been the son of Husseinbhai. That is a question of fact and the decision

(1) (1881) L. R. 8 I. A. 8.

(2) (1864) 2 B. H. C. R. 285.

(3) (1893) 21 Cal. 666.

(4) (1869) 12 W. R. 497.

(5) (1888) 10 All. 289.

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of it rests with the lower Courts Mr Rao, however, urges that one of the *necessary facts is the recital to* be found in the deed of gift by Husseinbhai to the 3rd defendant, Ex 142, in which occurs this passage "The reason why these fields are given to you in gift is that your parents died leaving you only about twenty days old" It is, therefore, urged that we have no option but to infer that whosoever may have been the father of the 3rd defendant, that father could not have been *the donor, Husseinbhai We think the answer* to this contention is that the admission which we have set out is only one fact among many other facts upon which the lower Courts had to determine the question whether the 3rd defendant was shown not to be the son of Husseinbhai It cannot be said that the learned Judges below have omitted to consider the admission in the deed of gift nor can it, we think, be said that by reason of that admission they were bound to come to the conclusion in the appellants favour What they have done is, we think what they were bound to do They have considered this admission as one piece of evidence, but on a general examination of all the evidence bearing upon this point they have found that the 3rd defendant is not shown to have been the son of any person other than Husseinbhai That conclusion of fact being perfectly open to the Judges below on the evidence is not, in our opinion, subject now to review in Second Appeal And since that is the conclusion of fact the position in law seems to us to be precisely that which according to Mr Justice Mahmood in *Muhammad Allahdad Khan v Muhammad Ismail Khan*(1), *invites the application* of the Mahomedan doctrine of *ikrar* or acknowledgment for the learned Judge says at page 335 of the Report "The doctrine relates only to cases where either *the fact of the mar-*

(1) (1888) 10 All. 289

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riage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from disproved." So here as we understand the judgments both Courts hold that the probability is that defendant 3 is the son of Husseinbhai by a union of doubtful validity.

The only other argument submitted on behalf of the appellants was based upon the Privy Council decision in *Abdul Razak v. Aga Mahomed Jaffer Bindanim*[1] which followed their Lordships decision in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan*[2] The argument was that for an acknowledgment of sonship to be valid according to Mahomedan law it must be an acknowledgment not merely of sonship but of legitimate sonship. It is clear, however, that the decision in the two cases which we have noticed must be read in the light of the facts which were then before the Privy Council, and in both of these cases the Court was concerned with a Mahomedan son born out of wedlock so that it was imperative to see that the acknowledgment relied upon was not a mere acknowledgment of sonship as opposed to an acknowledgment of legitimacy. In our present case there is not any such special reason for insisting upon a clear expression of the acknowledgment of legitimacy and though the actual declaration of acknowledgment includes only an admission of sonship yet that admission, when read according to the circumstances of this case must we think be regarded as tantamount to an acknowledgment of legitimate sonship. That is the view which both the Courts have taken upon the evidence as to the treatment which Husseinbhai gave to the 3rd defendant, as to the conduct which each of them pursued towards each other

(1) (1893) 21 Cal 666 (2) (1866) 11 M. I. A. 94

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and as to the terms upon which they stood as disclosed in the deeds of gift We are satisfied upon the same evidence that the acknowledgment, though in express terms only acknowledging sonship, must, in the circumstances now appearing, be taken to have amounted to an acknowledgment of legitimate sonship

These being the only two points urged on the appellants' behalf and both of them, in our opinion, failing for the reasons stated, we confirm the lower Court's decree and dismiss the appeal with costs

Appeal dismissed

R R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

1915 July 15

MAJIDMIAN BANUMIAN (ORIGINAL DEFENDANT 1) APPELLANT v BIBI SAHEB JAN WIDOW OF THE DECEASED NANUMIYAN BANUMIAN SHAIKH AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 2 AND 3) RESPONDENTS *

Mahomedan Law—Dower—Right to retain property in lieu of dower—Heritable right

The right which a Mahomedan widow having a claim to dower acquires on obtaining possession of her husband's property is a heritable right

It is a substantial right and if she is wrongfully dispossessed she can maintain a suit to recover possession

FIRST appeal against the decision of P N Sanjana Joint First Class Subordinate Judge at Surat, in Suit No 97 of 1909

The facts were as follows —

One Nanumiyan a Sunni Mahomedan the owner of the house in suit died in May 1907 He left him sur-

* First Appeal No 191 of 1913

viving his mother Misri Bibi two widows, Bibi Lalkhatum and Bibi Saheb Jan (plaintiff No 1), one daughter Bibi Fazl Unnissa (defendant No 2) and one brother Majidmiyan (defendant No 1) The mother died a year or two later The senior widow Lalkhatum died in December 1906 The junior widow Saheb Jan and the heirs of the senior widow joined in bringing the suit against the brother and daughter of Nanumiyan Their case was that the dower fixed for Lalkhatum at the time of her marriage was Rs 50 000 and that fixed for Saheb Jan was Rs 7,500, that Nanumiyan died without paying any part of the said dower, that the widows remained in possession of the house in lieu of the said dower until 1906 and that thereafter the surviving widow and the heirs of the deceased widow had been in peaceful possession of the house until 1908 when the brother disputed their claim to retain possession of the house and tried to disturb them in their possession They filed the suit on the 13th April 1909 asserting their claim to the house in respect of the whole dower of Rs 57,500

The brother defendant No 1, contended that the amount of the dower was not fixed as stated by the plaintiffs that the widows had renounced their claim to the dower at the time of Nanumiyan's death that the house in suit did not belong to his brother exclusively but to both of them jointly that the widows had never been in possession of the house in lieu of their dower and that according to Mahomedan Law they had no right to the house He also maintained that the two rooms, which were admittedly in his possession were not held by him with the permission of the widows but in his own right

The daughter defendant No 2 admitted the plaintiff's claim

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The Subordinate Judge held that the amount of dower due to the two widows was Rs 50,000 and 7,500, that they had a right to retain possession of the house in lieu of their unpaid dower except the two rooms which were lawfully in possession of defendant No 1 and that on Lalkhatum's death the right descended to her heirs He further directed the defendants not to obstruct the plaintiffs in retaining possession of the house which was already in their possession His reasons were as follows —

Under Mahomedan Law the widow s claim for dower is a debt against the husband s estate and it must like other debts be paid before legacies and before distribution of the inheritance It does not entitle her to a lien on any specific property of her deceased husband so as to enable her to follow that property as in the case of a mortgage into the hands of a *bona fide* purchaser (6 Bom L R 54) Where however she lawfully and without force or fraud obtains possession of her husband s property she is entitled to retain possession until her dower debt is satisfied subject to her liability to account for the profits received (14 Moo I A 377)

In the case of *Amanat un nissa* v *Bashir un nissa* I L R 17 All 77 it was held that obtaining possession lawfully meant obtaining possession by contract with her husband or by putting her into possession or by her being allowed with the consent of the heirs on his death to take possession But the case was doubted in the case reported in I L R 32 All 551 and was expressly dissented from in the case in I L R 32 All 563 where it was held a Mahommedan widow to whom the dower is due who enters into possession of her husband s property on his death is entitled to hold the estate against the other heirs until her claim to dower is satisfied subject to her liability to account for the property which she may receive while so in possession *It is not necessary for her to show that the deceased husband or her heirs consented to her getting into possession* The above case in I L R 17 All 77 on which the defendant s pleader relies was also dissented from by the Calcutta High Court in I L R 38 Cal 475 when their Lordships decided that under the Mahomedan Law when a widow is in possession of the undistributed property of her deceased husband such possession having been obtained lawfully and without force or fraud and her dower or any part of it is due and unpaid she is entitled as against the other heirs of her husband to retain such possession until her dower debt is paid *The possession need not necessarily be possession obtained by an agreement with her husband or his heirs* These two are the most recent rulings on the point and therein all the previous

ases have been fully considered and weighty reasons have been given why the view expressed in I L R 17 All 77 should not be followed In a case in 9 Bom L R p 188 the Bombay High Court has held under Mahomedan Law a widow s claim for dower is a debt against the husband s estate But when the widow obtains actual possession of the estate she is a mortgagee of her husband under a claim to hold it as one of the heirs and for her dower she is entitled to retain possession until her dower is satisfied the liability to account to those entitled to the property being subject to the claim for the profits received Her possession cannot be disturbed until her dower debt has been satisfied and when lawfully in possession of her husband s estate she occupies a position analogous to that of a mortgagee The Bombay ruling seems to put her claim on a higher footing Following these rulings I hold that the consent of the husband or of his heirs is not necessary to make the widow s possession lawful But even if such a consent be necessary I find that there was an implied consent on the part of the defendant because he has not only acquiesced in the widow s taking possession of the property but admittedly whenever the tenants paid rent to him he has handed over the same to N s widow o o o

Relying on the case in I L R 20 All 262 and I L R 29 All 640 the defendant contends that the widow s lien for dower is a purely personal right and is not heritable or transferable But the same High Court has in a more recent case refused to follow the ruling in those cases and followed the contrary ruling in an older case in I L R 7 All 353 and held that the right of a Mahomedan widow who has entered into possession of her husband s property peacefully and without fraud in lieu of her dower debt is a heritable right and her heirs are entitled to remain in possession until the debt is satisfied (I L R 32 All 551) All these cases bearing on the subject have been very carefully considered in that case and the reasons why the rulings in I L R 20 All 262 and 29 All 640 should not be followed and that in I L R 7 All 353 should be followed have been clearly given I need not repeat those reasons here but I fully adopt them and for the reasons given therein I think the law as laid down in the most recent case is correct and I refuse to follow the contrary ruling in the older case In the case in 9 Bom L R p 188 cited above the widow s position is held to be analogous to that of a mortgagee In any case the claim for a dower is a debt which the widow s heirs inherit If they inherit this debt they must also inherit with it the security for that debt The hypothetical case conceived in the above case in I L R 32 All at p 561 is the very case before us namely of a widow who has held possession of her husband s property in lieu of dower for many years over and above the period of limitation within which she must sue for her dower debt and has then died without the debt being fully satisfied If the heirs are not entitled to inherit they lose all means of recovering the

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balance of the debt due This would cause a real hardship and injustice I therefore follow the case in I L R 32 All p 551 and hold that the right is heritable and so long as the debt remains unpaid the widow's heirs have the right to continue in possession I accordingly find on the 17th issue in the affirmative

The defendant No 1 appealed from the decree The plaintiffs filed cross-objections

Manubhai Nanabhai for the appellant —The lower Court is wrong in holding that the consent of the heirs is not necessary I rely on *Amanat-un-nissa* v *Bashir-un-nissa*[1] *Mussamut Wahidunnissa* v *Mussamut Shubrattun*[2], *Bibee Mehran* v *Mussamut Kubiran*[3], *Bibee Selamut* v *Shaikh Mowla Buksh*[4], *Mussumat Ameerun* v *Mussumat Ruheemun*[5] *Mussumat Meeran* v *Mussumat Najeebun*[6] Macnaghten's Principles and Precedents of Mahomedan Law p 291, case XXXVII, p 407, case No 27 Faiz Tyabji's Principles of Mahomedan Law, pp 109-124

The original entry into possession by the widow ought to have been under a distinct claim for dower and not merely as a co sharer of the inheritance Faiz Tyabji's Principles of Mahomedan Law, pp 120 125, 124 *Mussumat Bebee Bachun* v *Sheikh Hamid Hossein*[7]

In this case it is admitted by the plaintiffs that such entry and claim, if any, took place only in 1901 At that time, the dower debt itself had become time-barred under article 104 of Limitation Act, and no lien could arise for such a debt The possessory lien of a widow in lieu of her dower is a right personal to the widow It cannot be assigned nor can it devolve on the heirs It is a security given to the widow personally by way of facility by the other heirs for retaining her husband's

(1) (1894) 17 All 77
(2) (1870) 6 Beng L R 54
(3) (1870) 6 Beng L R 60 (f n (2))
(4) (1866) 5 W R 194
(5) (1867) 2 Agra 362
(6) (1867) 2 Agra 335
(7) (1871) 14 Moo I A 377 pp 382 383 384

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property But the assignees of the widow's heirs would be generally strangers to the family to whom their presence or possession might be objectionable

I rely on *Hadi Ali* v *Akbar Ali*[1] which was approved of in *Muzaffar Ali Khan* v *Parbati*[2]

B G Rao for the respondent —The consent of the heirs is not necessary, see *Ramzan Ali Khan* v *Asghari Begam*[3] and *Sahebjan Bewa* v *Ansaruddin*[4] which do not approve of the decision in *Amanat-un-nissa* v *Bashir-un-nissa*[5] *Bibee Tajun* v *Syud Wahed Ali*[6]

The possessory right of the widow is heritable *Azizullah Khan* v *Ahmad Ali Khan*[7] *Ali Bakhsh* v *Allahdad Khan*[8]

Manubhai in reply —In English Law lien has always been treated as a personal right and cannot be assigned Halsbury's Laws of England Vol XIX, p 3 It does not give a right of action but is merely a passive right of defence to *retain* possession once lawfully acquired If somehow the possession is lost even by fraud the lien goes with it, and the person dispossessed has no right to recover it back (ibid pp 3, 25, 28 29) except perhaps in a suit under section 9 of the Specific Relief Act This suit therefore, by the plaintiff to *recover* the possession is not maintainable

SHAH J —This appeal arises out of a suit for the declaration of a certain lien over a house and for confirmation and recovery of possession of different parts of the same house The owner of the house was one Nannumiyan a Sunni Mahomedan who died in May

(1) (1898) 20 All 262
(2) (1907) 29 All 640 at p 646
(3) (1910) 32 All 563
(4) (1911) 38 Cal 475 at pp 477 479
(5) (1894) 17 All 77
(6) (1874) 22 W R. 118
(7) (1885) 7 All 353
(8) (1910) 32 All 551

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1897 He left behind him his mother Misri Bibi, two widows Bibi Lalkhatum and Bibi Saheb Jan, one daughter Bibi Fazl-un-nissa and one brother Majidmiyan The mother died a year or two later The senior widow Lalkhatum died in December 1906 The widows lived in the house at the time of their husband's death and their case is that they continued to live there until their return to Shikarpur in Sindh to their paternal relations in 1906 The junior widow Saheb Jan and the heirs of the senior widow join in bringing the present suit against the brother and daughter of Nanumiyan Their case is that the dower fixed for Lalkhatum at the time of her marriage was Rs 50,000 and that fixed for Saheb Jan was Rs 7,500, that Nanumiyan died without paying any part of the said dower that the widows remained in possession of the house in lieu of their dower until 1906 and that thereafter the surviving widow and the heirs of the deceased widow had been in peaceful possession of the house until 1908 when the brother disputed their claim to retain possession of the house and tried to disturb them in their possession They filed the suit on the 13th April 1909 asserting their claim to the house in respect of the whole dower of Rs 57 500 The brother disputed the claim on various grounds He contended that the amount of the dower was not fixed as stated by the plaintiffs, that the widows had renounced their claim to the dower at the time of Nanumian s death that the house in suit did not belong to his deceased brother exclusively but to both of them jointly, that the widows had never been in possession of the house in lieu of their dower, and that according to the Mahomedan law they had no right to the house He also maintained that the two rooms which were admittedly in his possession, were not held by him with the permission of the widows but in his own

right The daughter, defendant No 2, admitted the plaintiff's claim

The trial Court raised several issues of fact and law and decided them in favour of the plaintiffs except as to two rooms The learned First Class Subordinate Judge held that the dower due to the two widows was Rs 57,500, that the widows had been in possession of the house except the two rooms, which were found to be lawfully in the possession of defendant No 1, in lieu of their dower, that the plaintiffs were in possession up to 1908 when the cause of action arose against defendant No 1 and that they were entitled to the reliefs claimed He disallowed the plaintiffs' claim as to the two rooms in the possession of defendant No 1 A decree was passed on the 25th April 1913 giving effect to the findings in favour of the plaintiffs

The defendant No 1 has appealed against this decree in respect of the main part of the house, and the plaintiffs have filed cross-objections in respect of the two rooms The cross objections, however, are not pressed and we have only to consider the points urged in support of the appeal It will be convenient to keep the questions of fact and law distinct and to deal with the former in the first instance

As regards the amount of dower, it has been urged generally that the evidence is all oral and relates to events which occurred several years ago and that it is interested and not reliable It is true that Nanumiyan's marriage with Lalkhatum took place in 1870 and that with Saheb Jan in 1891 But there is a large body of evidence in the case, and it is quite impossible to treat the whole of it as being either interested or unreliable It is obvious from the agreement, which Nanumiyan passed at the time of his marriage with Lalkhatum, that he valued this connection very highly and was

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prepared to submit to any terms in order to secure it The position of Lalkhatum's father's family was such that there is no inherent improbability in such a large amount being fixed for her dower The evidence of Sadak Ali, brother of Lalkhatum, also explains the circumstances under which Nanumiyan's marriage with Saheb Jan was brought about We see no reason to distrust the oral evidence adduced in support of the plaintiffs' allegations on this point, and we accept the conclusion arrived at by the lower Court, viz, that the dower for Lalkhatum was Rs 50,000 and that for Saheb Jan was Rs 7,500

It is not necessary to consider, and the point was not mentioned in the argument, whether the dower was prompt or deferred It makes no difference in the result, as it is not suggested that any part of the dower was demanded during the husband s life-time The plea of remission by the widows of their claim to dower has been wisely abandoned in this appeal

Next as regards the ownership of the house, the lower Court has found, and in our opinion rightly found, that it belonged exclusively to Nanumiyan It has been conceded by Mr Manubhai for the appellant that the whole money spent in building the house belonged to Nanumiyan, and that nothing was proved to have been paid by his client It was urged, however, that the house site originally belonged to the ancestors of the two brothers, and that he had an interest in the land over which the house was built But a careful perusal of the evidence of defendant No 1 and of his step-brother Shaikh Bahadur on this point shows that this account of the house site having originally belonged to the ancestors of Nanumiyan is really past history and has nothing to do with the present question The lower Court seems to us to be quite right in holding that after changing hands it ulti

mately came in the hands of Nanumiyan as owner from his step-brother Shaikh Bahadur for valuable consideration

On the question of possession of the house, however, there has been more serious argument It has been urged by Mr Manubhai that though the widows obtained possession of the house, they did not obtain it in lieu of dower with the consent of defendant No 1 The fact of the possession having been with the widows up to 1906 is not disputed and it cannot be disputed in view of the clear admission of defendant No 1 in his cross-examination that "they (i e, the widows) lived in the house after Nanumiyan s death till the death of Lalkhatum in 1906" There is nothing to show that their possession was not peaceful Defendant No 1 knew about their possession, and was himself in possession of a part of the upper story, viz, the two rooms already mentioned There was no protest from him, and no dispute at the time The matter, however, does not rest there He says he "used to let out the hall on the ground floor of the premises in suit, but the rent used to be accumulated with the Bibis It seems to us to be futile to suggest under these circumstances that the widows possession was without the consent of the heirs The mother of Nanumiyan died in 1898 or 1899 and never disputed the widows claim The daughter does not dispute it The only heir who disputes the fact of their having been in possession with the consent of the heirs is defendant No 1 The evidence clearly shows that the defendant No 1 not only acquiesced in but accepted the fact of the possession of the house (two rooms of course excepted) being with the widows

It was further urged that though they might have been in possession with the consent of defendant No 1

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they never asserted that they held the property in lieu of dower This contention has no force All the assets of Nanumiyan were exhausted in discharging his debts, which (debts) amounted to about Rs 10,000 The house and furniture were the only assets left, and the widows were in possession of the house from the time of Nanumiyan's death Under the circumstances it would be a fair inference to hold that they were in possession in lieu of dower It is common ground that the widows were helped by Sadik Ali, brother of Lalkhatum and it is difficult to understand why they should have stayed at Surat up to the year 1906 instead of returning to their parental house in Sindh, if it were not for the purpose of asserting their right to the only substantial property which was left after paying off Nanumiyan's debts In connection with this point Mr Manubhai relied upon the circumstance that the estate of Nanumiyan was jointly administered by all the heirs as the two sale-deeds and the succession certificate in the names of the widows and defendant No 1 would show, and that the widows really took possession of the house in lieu of dower after the debts were discharged The fact that defendant No 1 joined the widows in selling certain properties and recovering certain outstandings of Nanumiyan is not inconsistent with the widows having been in possession of the house in lieu of their dower It seems to us on the evidence that the widows really discharged the debts, and defendant No 1 simply helped them in conveying the properties and in recovering the few outstandings of Nanumiyan Besides in view of the fact that they were in possession of the house from the beginning, it is difficult to see how their possession in lieu of dower can, in point of fact, be treated as commencing from the date when all the debts were discharged Here we are speaking only

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of the fact, and do not mean to suggest that as a matter of law it would make any difference whether they purported to hold in lieu of dower or not and whether their possession in lieu of dower commenced in 1897 after Nanumiyan's death or somewhere in 1901 when all the debts are said to have been satisfied. We, therefore, agree with the lower Court that the widows were in possession of the house with the consent of the other heirs in lieu of their dower.

It has been urged, however, that even if the widows were in possession in 1906 there is nothing to show that the heirs of Lalkhatum had possession since 1906, when both the widows returned to Shikarpur leaving the house in charge of their servant Khan Mahomed. It is clear that Saheb Jan continued in possession through her servant Khan Mahomed even after 1906. But it is urged that the heirs were never in possession. It seems to us that there is no substance in this contention. In the first place it was never suggested in the lower Court that the heirs of Lallkhatum were not in possession since 1906 though Saheb Jan was. All along the defendant pleaded that he was in possession and not the widows. Having failed to substantiate that plea he now contends that Lallkhatum's heirs were not in possession. But it is common ground that Sadak Ali, who is one of the heirs of Lallkhatum and the principal man among her paternal relations has throughout helped the two widows after Nanumiyan's death. It is established that Sadak Ali had been to Surat after Lalkhatum's death in 1907 when he occupied the house in suit. It is clear from the evidence of Sadak Ali, Saheb Jan and Khan Mahomed that all the Municipal taxes for the house have been paid by Sadak Ali after 1906 up to the date of this suit. Defendant No. 1 also admits the fact in his evidence. Khan Mahomed looked to Sadak ali for instructions

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when there was any occasion for it, and Sadak Ali says distinctly that Khan Mahomed had charge of the house on behalf of the heirs of Lalkhatum and on behalf of Bibi Saheb Jan This definite statement is met by defendant No 1 by no specific denial but by the assertion that "he (Khan Mahomed) is still in service either of Saheb Jan or Sadak Ali " Surely defendant No 1 is expected to know the position of the servant Sadak Ali in fact took defendant No 1 with him in 1907 to Khairpur for some employment and his equivocal statement under the circumstances seems to us to be virtually an admission that the servant was in possession of the house on behalf of all the plaintiffs and not only on behalf of Saheb Jan In 1907 Sadak Ali took certain articles from the house, which he could do only if he was in possession, and it is in evidence that he had the keys with him when he went there We are, therefore, of opinion that the present plaintiffs continued to have possession of the house after Lalkhatum's death until the disputes arose between the parties in 1908, that the possession of the ground floor of the house has been throughout with them, and that their possession of the upper story excepting the two rooms in the possession of defendant No 1, was disturbed after the plaint was filed as stated in the amended plaint

Before dealing with the points of law argued in this case, we desire to state generally that the evidence of the plaintiffs No 1 and 2 in this case appears to us to be much more reliable than that of defendant No 1 The readiness with which he has committed himself to altogether untenable positions, particularly with reference to the questions of the ownership of the house, and of the amount and remission of dower, is sufficient to shake one's confidence in his case generally

It is urged by Mr M... widows would have no r... house in respect of dower unle... with the consent of the other h... that in any case this right to ret... entirely personal and does not de...nd to the h... Lalkhatum and that the right which is in the ... of a lien is a right of defence and not a right of ... and that therefore the claim to recover po... which is in fact lost by the plaintiffs is not good

As regards the first of these contentions it is enough to say that it does not arise, as it is found that the widows had obtained possession in lieu of dower with the consent of the other heirs of Nanumiyan Mr B G Rao has urged in support of the plaintiffs' case that even if the consent of the heirs were not proved and even if it were not established that the possession was in lieu of dower, the widows would still have a right to hold the property of their husband until their claim to dower was satisfied provided they had obtained possession lawfully and without force or fraud He has relied upon *Ramzan Ali Khan* v *Asghari Begam*[1] and *Sahebjan Bewa* v *Ansaruddin*[2] These decisions are in conflict with the case of *Amanat-un nissa* v *Bashir un-nissa*[3] It is not necessary to decide this question in view of the finding that in this case the widows obtained possession of the property with the consent of the heirs in lieu of their dower

The second contention is that so far as the heirs of Lalkhatum are concerned they have no claim as the right of Lalkhatum was personal and could not devolve upon her heirs on her death There is a conflict of decisions of the Allahabad High Court on this point The right is held to be heritable in *Azizullah Khan* v

(1) (1910) 32 All 563 (2) (1911) 38 Cal 475

(3) (1894) 17 All 77

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Ahmad Ali Khan[1] and *Ali Baksh* v *Allahdad Khan*[2] A different view is taken in *Hadi Ali* v *Akbar Ali*[3] and *Muzaffar Ali Khan* v *Parbati*[4] There is no decision directly on this point which is binding upon us It is necessary, therefore, to consider the nature of the right, which the widow, having a claim to dower, acquires on obtaining possession of her husband's property This right has been described by their Lordships of the Privy Council in *Mussumat Bebee Bachun* v *Sheikh Hamid Hossein*[5] as follows —"It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein* v *Mussamut Khodeja*[6] Whatever the right may be called, it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband, of which she has lawfully, and without force or fraud obtained possession until her debt is satisfied with the liability to account to those entitled to the property, subject to the claim for the profits received" This is in our opinion a substantial right and under certain circumstances it would practically be a right in substitution of the claim for dower Where the amount of dower is large and far in excess of the value of the property of which the widow has obtained possession and where there is no other property of the husband as in the present case the right of the widow to hold the property in lieu of her dower is the only right left and in our opinion as substantial a right as her claim to dower It is not disputed and cannot be disputed that the claim to dower is heritable and would devolve on her heirs

(1) (1895) 7 All 353
(2) (1898) 20 All 262
(3) (1910) 32 All 551
(4) (1907) 29 All 640
(5) (1871) 14 Moo I A 377 at p 394
(6) (1869) 10 W R 369

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It is difficult to understand why the right, which is an incident of the claim to dower, and is capable of being enjoyed as a substantive right in substitution of the claim to dower under certain circumstances should be treated as a merely personal right, when the principal right of which it is an incident, is not so treated according to the Mahomedan law It may be, as in this case, that after the widow has had possession for several years, her claim to dower may be time-barred and she would care only for the right to hold the property in lieu of dower The heirs would not care to have any accounts taken when it is clear that the proceeds fall far short of the amount due to the widow The right to the possession of property appears to be quite a substantive right and we see no reason to treat it as personal, when the claim to dower is a heritable right For instance if a widow does not obtain possession of her husband's property, and sues the heirs in respect of her dower she can obtain a decree and bring the property to sale She would obtain the proceeds of the sale, and these proceeds would devolve on her heirs There is no reason why the alternative right which a Mahomedan widow has of holding the property of her husband, with the liability to account in lieu of her dower should not devolve on her heirs on her death This contention must therefore be disallowed

It remains to consider the last contention that the plaintiffs having been dispossessed of the portion of the upper story other than the two rooms which were already in the possession of defendant No 1 they cannot maintain an action to recover it though they may be able to retain possession which they have already got This contention is based upon the analogy of lien It seems to be unnecessary to determine whether it is a lien or the position is more analogous

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to that of a mortgagee Taking the right as described in the passage already quoted from the judgment in *Mussumat Bebee Bachun s* case,[1] and treating it as a matter of substance and not of words, it seems to us that if the right is to be a real one the widow should have the right to claim back the possession, if it has been wrongfully disturbed by any body In this case the plaintiffs are found to have been in peaceful possession for a long time, and the wrongful dispossession by defendant No 1 is no answer to their right to possession No doubt in most of the cases cited before us the widow was in possession and was resisting the claim to oust her But it is no ground for holding that after having peaceful possession for a long time if she were wrongfully dispossessed she could not sue to recover the possession In the case of *Azizullah Khan* v *Ahmad Ali Khan*[2] to which we have referred in connection with another point, it has been held by Oldfield and Mahmood JJ that the heirs of the widow, who were held to be entitled to succeed her in possession, have a right to maintain a suit for the recovery of the possession, if wrongfully deprived thereof All the points urged in support of the appeal fail

We, therefore affirm the decree of the lower Court and dismiss the appeal and cross objections with costs

Decree confirmed

J G R

[1] (1871) 14 Moo I A 377 at p 384 [2] (1885) 7 All 353

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

MANCHHARAM PRANJIVANDAS (ORIGINAL DEFENDANT No 1) APPELLANT *v* PANABHAI LALLUBHAI AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS*

1915 *July 16*

Limitation Act (IX of 1908) article 91—Alienation by Hindu widow—Suit by reversioner to recover possession of property alienated—Alienation found to be sham—Limitation

A Hindu widow having alienated a property of her husband the reversioners sued more than three years after the date of alienation to recover possession of the property It was found that the alienation was merely a sham The lower Courts held that article 91 of the Second Schedule of the Limitation Act 1908 did not apply and decreed the suit The defendant having appealed

Held that article 91 of the Second Schedule of the Limitation Act had no application for the apparent obstacle presented by the mortgage proved unreal and ineffectual

SECOND appeal from the decision of M S Advani, District Judge of Surat, confirming the decree passed by N V Desai, Subordinate Judge at Surat

The plaintiffs, who were reversionary heirs of one Tribhuvandas, sued to recover possession of property belonging to the deceased He died on the 9th July 1900 After his death, his widow Dahi gave birth to a posthumous son, who died when he was three years of age

On the 21st October 1903 the widow gave an equitable mortgage of the property to the defendant No 1 who was her brother On the 15th June 1904 she executed a registered mortgage of the property in favour of her brother

Dahi (defendant No 2) next contracted a remarriage

On the 21st December 1908 the plaintiff sued to recover possession of the property free from the encumbrance created by Dahi

* Second Appeal No 283 of 1914

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MANCHHARAM v. PANABHAI LALLUBHAI

The Subordinate Judge decreed the plaintiffs' suit holding that "the registered mortgage was never intended to operate as a real mortgage at all and that article 91 of the Limitation Act did not apply

This decree was, on appeal, confirmed by the District Judge who treated "the story of the equitable mortgage" as "absolutely false"

The defendant No 1 appealed to the High Court

K N Koyajee for the appellant —I submit the suit was barred under article 91 of the Indian Limitation Act The plaintiffs could not succeed until the mortgage-deed was first set aside, which was the substantial relief sought, though possession was asked for *Rampal Singh* v *Balbhaddar Singh*[1], *Raghubar Dyal Sahu* v *Bhikya Lal Misser*[2] and *Mallkarjun* v *Narhari*[3]

[BATCHELOR, J —The lower Courts treat the mortgage deed as a sham document and inoperative Would not the principle of the Privy Council decision in *Petherpermal Chetty* v *Muniandy Servai*[4] apply ?]

Here the respondents knew of the mortgage-deed all along and the appellant had taken possession of the property and so if there was any fraud, it was carried out

P D Bhide for respondents Nos 1 to 3 was not called upon

BATCHELOR, J —The appellant here was the 1st defendant in the suit, and the suit was brought by the plaintiffs for possession of a house The plaintiffs claimed as legatees or reversioners either of one Tribhowandas or of Tribhowandas posthumous son, who

(1) (1902) 25 All 1 at p 16
(2) (1885) 12 Cal 69 at p 75
(3) (1900) 25 Bom. 337 at p. 351
(4) (1908) 35 Cal 551

urvived Tribhowandas for a period of three years. Four years after Tribhowandas' death his widow, who was the 2nd defendant, mortgaged the house in suit to the present appellant who was her own brother.

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The only questions with which we are concerned in this appeal are, whether the mortgage by the widow was without necessity and whether the plaintiffs' suit is out of time. On the first point the finding of the lower Courts that the mortgage was without necessity is conclusive as being a finding of fact, and though we have allowed Mr. Kovajee, for the appellant, to point out to us some alleged slips in the judgment of the lower Court upon this question, we are clearly of opinion, without examining whether the alleged slips or mistakes are really mistakes, that there is ample and convincing evidence for the lower Court's finding on this point.

As to the question of limitation the argument for the appellant is that the suit is governed by article 91 of the Indian Limitation Act which prescribes for the institution of the suit a period of three years from the date when the facts entitling the plaintiff to have an instrument cancelled or set aside become known to him. The contention is that though in form the present suit is a suit for possession yet it must be regarded as essentially a suit to set aside the widow's mortgage, because until that mortgage is set aside the plaintiffs cannot obtain possession of the property. As to this point the authorities we think are in accord, and are to the effect that where the deed or instrument which seems to stand between a plaintiff and the realization of his claim in the suit is an actual nullity the plaintiff is entitled to bring his suit for possession within twelve years and is not hindered by the narrower period laid down by article 91 and that if one may say so seems to be good sense. For the only object of article 91 is

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to compel a plaintiff to remove out of his way some real existing obstacle, but where there is no real obstacle, the article has no scope for operation Now here it is found in the words of the learned District Judge that "the story of the equitable mortgage is absolutely false" or in the still plainer language of the trial Judge "the deed passed by the widow to her brother was never intended to operate as a real mortgage transaction" What we have, therefore, is not a mortgage or any real thing whatsoever, but a mere sham or nothing, which the plaintiffs were under no obligation to sue to remove

There are many decisions which seem to us to bear out this construction of article 91 but it will be sufficient for our present purpose to refer to what was said by the Privy Council in *Pethaperumal Chetty v Muniandy Servai* [1] where Lord Atkinson observed "As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895 being an inoperative instrument, as, in effect it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims So here the apparent obstacle created by the mortgage is now ascertained to be no obstacle or real thing at all Therefore, there was never anything which it could have been the plaintiffs' duty to remove from their path before they could claim possession

The appeal is dismissed with costs

Appeal dismissed

R R

(1) (1908) 35 Cal 551 at pp 559-560

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

SHANKAR BABAJI KULKARNI (ORIGINAL PLAINTIFF) APPELLANT *v* DATTATRAYA BHIWAJI AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS* 1915 *July 16*

Bombay Hereditary Offices Act (Bom Act III of 1874) sections 25 36—Suit for a declaration—Declaration that plaintiff is the nearest heir of a deceased representative Vatandar—Watan—Civil Court—Jurisdiction

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is within the jurisdiction of a Civil Court although a declaration that the plaintiff is entitled to have his name entered in Vatan Register is a matter beyond the jurisdiction of the Court

Rahimkhan v *Dadamiya*[1] followed

SECOND appeal against the decision of G K Kanekar, First Class Subordinate Judge, Sholapur, confirming the decree passed by Sumitra Anant, Second Class Subordinate Judge at Pandharpur

Suit for declaration

Plaintiff alleged that he and the defendants belonged to the Kulkarni family of Bhalvani that the Kulkarni Vatan stood in the name of Ramchandra Bhimaji He died in 1908 and the name of defendant No 1 was entered in his place in the Vatan Register The Vatan was to continue to the senior branch The plaintiff belonged to the senior branch but in consequence of the defendant's objection the plaintiff's name was not entered in the Vatan Register He therefore sued for a declaration (*a*) that he being of the senior branch of the family, was a nearer heir of Ramchandra than the defendant, and (*b*) that he had a right to have his name entered in the place of Ramchandra with respect to the Kulkarni Vatan at Bhalvani

* Second Appeal No 279 of 1914

(1) (1909) 34 Bom 101

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The defendant No 1 pleaded that the plaintiff was not the heir of deceased Ramchandra that there was no custom in the Vatan that it was to descend to the senior branch, that the Court had no jurisdiction to try the suit

The Subordinate Judge following the decision in *Raoji v Genu*[1] held that the Court had no jurisdiction to entertain the suit and therefore dismissed it

On appeal, the decree of the Subordinate Court was confirmed

The plaintiff preferred a second appeal

G K Parekh for the apellant —The case is governed by section 36 of the Hereditary Offices Act, as amended by Act III of 1910 and not by section 25 of the Act The principle laid down in *Rahimkhan v Dadamiya*[2] governs the present case

A G Sathaye for the respondent No 1 —In the present case it is essential to analyse the nature of the suit and the relief asked The plaintiff sued for a declaration that he was the nearest heir of the deceased Ramchandra Bhimaji inasmuch as he belonged to the senior branch and that as such he had the right to have his name entered in the Collector s Vatan Register in place of Ramchandra The relief claimed by the plaintiff is thus twofold first, that he is the nearest heir and secondly his name should be entered in the Collector s books instead of that of defendant No 1 The granting of the 1st relief necessitates an enquiry into the custom of the Vatan as to whether the Vatan passes according to the lineal primogeniture or the ordinary primogeniture and I submit that such an enquiry being within the exclusive jurisdiction of the Collector according to the provisions of section 25 of

(1) (1896) 22 Bom. 344 (2) (1909) 34 Bom. 101

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the Bombay Hereditary Offices Act III of 1910, the Civil Courts are not competent to grant that relief. In *Shivaji Nilkanth* v. *Tuko Bhimaji Nodgir*[1] it is laid down that the Civil Courts have no jurisdiction in matters which are within exclusive jurisdiction of the Collector.

As regards the second relief, the suit being one substantially for having the Collector's Register corrected and amended it is beyond the jurisdiction of the Civil Courts:—*Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni*[2], *Vasudev Vithal Samant* v. *Ramchandra Gopal Samant*[3], *Balkrishna Chimnaji* v. *Balaji Ramchandra*[4], *Jivanbhai* v. *Narsidas*[5], *Jivaji Sambhaji* v. *Falu Sabaji*[6]. The case of *Rahimkhan* v. *Dadamiya*[7] was under the old section 36 of the Hereditary Offices Act. According to that section, it was obligatory upon the Collector to recognise a certificate of heirship or a decree of a competent Court as conclusive proof of the facts stated or determined in such certificate or decree. The amendment of section 36 by Act III of 1910 was made after this ruling and as according to the amended section 36 it is optional with the Collector to recognise or not a certificate of heirship or a decree or order of a competent Court, the above ruling has now lost all its force. A Civil Court should not pass a decree which will not have a binding effect.

SCOTT, C. J.:—In this case the plaint stating the death of a Vatandar named Ramchandra alleged that the Kulkarni Vatan is to be continued in the eldest family, that the defendant No. 1 whose name was entered in the Register was not of the eldest family, and that the plaintiff was, and that in consequence of the

(1) (1885) P. J. [illegible] 06

(2) (1877) 2 Bom. 3[illegible]0

(3) (1881) [illegible] Bom. 1[illegible]9

(4) (1884) 9 Bom. 9

(5) (189[illegible]) 1 Bom. L. R. 180

(6) (191[illegible]) 36 Bom. 4[illegible]0

(7) (190[illegible]) 34 Bom. 101

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SHANKAR BADAJI v. DATTATRAYA BHIWAJI

defendants' objection the plaintiff's name was not entered in the Vatan Register Therefore, the plaintiff brings this suit praying for a declaration (*a*) that he, the plaintiff, being of the eldest family is the nearer heir of Ramchandra than the defendant, and (*b*) that the plaintiff has a right to have his name entered in the place of Ramchandra with respect to the Kulkarni Vatan at Bhalvani, he being of the eldest branch"

The lower Courts have held on the authority of *Raoji* v *Genu*[1] that they have no jurisdiction to entertain the suit, and it has therefore been dismissed In our opinion their decision is not correct *Raoji* v *Genu*[1] related to section 25 of the Hereditary Offices Act (Bom Act III of 1874) On the other hand, *Rahimkhan* v *Dadamiya*[2] which was distinguished in the lower appellate Court related to section 36 of the Bombay Hereditary Offices Act In that case it was said —

The conclusive determination of the question whether the statutory condition of eldership or heirship is satisfied becomes therefore a matter of importance to a person claiming to be the eldest son or nearest heir and it is a question which is not by the words of the Act reserved for the exclusive determination of the Collector This view of section 36 was taken by this Court in *Dalpat Jogidas* v *Punja Zipa*[3] when upon review it was held that a suit for a declaration that the plaintiff was the nearest heir of a deceased representative Vatandar was maintainable notwithstanding that it was manifest that the declaration was sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register '

Those decisions were passed upon section 36 of the Act before it was amended in 1910 Section 36 then provided that "A certificate of heirship or a decree of a competent Court shall, until revoked or set aside, be conclusive proof of the facts stated or determined in such certificate or decree Reference to "a certificate of heirship or a decree or order of a competent Court" is no longer in the same language Whether

(1) (1896) 22 Bom 344 (2) (1906) 31 Bom 101

(3) (1904) 11 Bom L R 1342 (F B)

or not the new reference has a different effect is a matter which we do not propose to determine The amended Act provides that —

If at any time any person shall by production of a certificate of heirship or of a decree or order of a competent Court satisfy the Collector that he is entitled to have his name registered as the nearest heir of such deceased Watandar in preference to the person whose name the Collector has ordered to be registered the Collector may subject to the foregoing provisoes cause the entry in the Register to be amended accordingly

Therefore, in connection with this question of heirship under the deceased Vatandar, the Act, as it stood before the amendment, and as it now stands since the amendment, recognises the possibility of the production of a decree of a competent Court upon the question of heirship affecting the entries in the Vatan Register

It has been argued that the second part of the declaration prayed in the plaint, namely, a declaration that the plaintiff is entitled to have his name entered in the place of Ramchandra in the Register is clearly a matter which would be beyond the jurisdiction of the Court Let that be granted, it does not prevent the plaintiff from getting relief under the first head to which upon the authorities he is entitled We are not prepared to agree with the learned Judge of the appellate Court that a declaration under the first head "as it would not be binding upon the Collector, would not serve any purpose whatever" As above stated, we do not propose to express any opinion as to the effect of the words of clause 3 of the proviso to the amended section Being of opinion that the Court has jurisdiction to give the relief asked for in the first paragraph of the prayer, we set aside the decree of the lower appellate Court and remand the case for trial Costs costs in the cause

Decree reversed

J G R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

1915 July 19

MADAPPA GANAPPA HEGDE (ORIGINAL APPLICANT) APPELLANT v JAKI GHOSAL GABRI GHOSHAL AND OTHERS (ORIGINAL OPPONENTS) RESPONDENTS [*]

Civil Procedure Code (Act V of 1908) Order XXI rule 19—Execution of decree—Cross claims under the same decree—Set off allowed even if one of the claims could not be recovered owing to bar of limitation

The applicant applied to execute a decree for recovering the amount Rs 445 8 0 which he was entitled to recover from the opponents as mesne profits Under the same decree the opponents were entitled to claim the sum of Rs 855 as costs from the applicant but they were prevented from recovering it as it was barred by limitation They however claimed to set off the amount against the amount sought to be recovered by the applicant The Subordinate Judge having allowed the set off the applicant appealed —

Held dismissing the appeal that the applicant could not be allowed to execute his decree for the smaller sum without reference to the larger sum which the decree awarded to the opponents

PROCEEDINGS in execution

The decree under execution was passed on the 31st March 1905 It was a decree for partition

The interests of plaintiff and defendant No 1 under the decree were purchased by the applicant, who recovered possession of their shares by partition in June 1912 The decree awarded mesne profits to the applicant s vendors The applicant applied to recover the mesne profits from November 1900 to July 1912

The opponents who were the remaining defendants under the decree were entitled to recover Rs 855-15-1 as costs from the applicant s vendors But they took no steps to recover the amount in time, and their claim to it became barred by limitation They, however,

[*] First Appeal No 172 of 1914

sought to set this amount off against the amount claimed by the applicant from them

The Subordinate Judge found that the amount of the mesne profits due to the applicant amounted to Rs 346-2-8 He held that the amount of costs payable to the opponents could be set-off against this amount and dismissed the applicant's application as there remained nothing due to him under the decree

The applicant appealed to the High Court

S S Patkar for the appellant —Under Order VIII, rule 6 of the Civil Procedure Code (Act V of 1908), a person can set off a claim which is "legally recoverable" Here the claim set off was barred in its recovery by the law of limitation it was, therefore, not legally recoverable and could not be set off The right to the amount was extinguished under section 28 of the Limitation Act

G S Mulgaonkar and *Nilkanth Atmaram* for the respondents —The present case is governed by Order XXI rule 19 Under the rules the person entitled to the larger amount can apply for execution only in respect of the excess The word 'entitled' in the rule does not mean 'capable of execution" or "legally recoverable" Rule 18 provides for the execution of cross decrees The fact that a claim is barred does not prevent the claim to be set off *Zumuurudoonissa* v *Radha Churn Ghuttuck*[1] Section 28 of the Limitation Act bars the remedy but does not extinguish the remedy *Nursing Doyal* v *Hurryhur Saha*[2], *Mohesh Lal* v *Busunt Kumaree*[3] Law recognizes title to barred debts sections 60 and 61 of the Contract Act They can form a good consideration to contracts section 2 clause 3 of the Contract Act

[1] (1868) 9 W R 510 [2] (1880) 5 Cal 897

[3] (1880) 6 Cal 340

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v.
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Patkar, in reply

BATCHELOR, J —This is an appeal in execution and the appellant was the original applicant for execution He is the purchaser of the interest of the plaintiff and the 2nd defendant in Suit No 74 of 1902 which was a partition suit On the 31st March 1905 a decree was made in the suit, and the present application is for mesne profits owing under that decree from the 19th December 1900

The lower Court has found that the mesne profits due amount to Rs 346-2-8, but admittedly that calculation is incorrect, and the exact sum due for mesne profits would be Rs 445 8-0 On the other hand, under the same decree the respondents were entitled to costs which, as has now been ascertained, amounted to Rs 855

The case, therefore, appears to be one for the application of the rule enacted in Order XXI, rule 19 For, this application is made for the execution of the decree under which two parties are entitled to recover sums of money from each other The sums being unequal, clause (*b*) of the rule provides that "execution may be taken out only by the party entitled to the larger sum, and for so much only as remains after deducting the smaller sum " It would follow from this provision that the appellant, who under the decree is entitled only to the smaller sum, has no right to apply for execution of the decree But it is answered the appellant has that right, because the respondents' claim to their costs is barred by limitation It is admitted that if the respondents claim to their costs is to be considered as a separate claim apart from the other provisions of the decree, then it is barred under article 182 of the Indian Limitation Act But it is not the fact that the respondents here are seeking to execute

the decree in respect of their claim for costs They are merely using those provisions of the decree to resist the application made by the other side, and I am of opinion that they are entitled to rely upon the decree for that purpose For as I read the rule it contemplates that the decree should be regarded as a single indivisible order of the Court enforceable only for the balance, that is, the difference between the two sums awarded, and that balance becomes awardable by the Court without the intervention of the parties as soon as the amount of the balance is determined Though the respondents would be barred by limitation from recovering the larger sum awarded to them under the decree, that circumstance cannot I think avail to enable the appellant to take out execution in a manner expressly forbidden by the Rule On this ground, I think, that the appellant's attempt to execute his decree for the smaller sum, without reference to the larger sum which the decree awards to his adversary must fail

This is the only point involved in the appeal though it was suggested by the appellant that there should be a direction to the Court to take further evidence as to the profits of the higher level *Badiaverg* land In my opinion, however no case has been made out which would justify us in allowing the appellant, who was the original applicant to reinforce the evidence which he elected to give before the lower Court

The appeal should therefore in my judgment, be dismissed with costs

HAYWARD J —I concur The appellants were entitled to mesne profits which were found upon calculation to be the smaller sum recoverable by either of the parties that sum must therefore be taken to have been entered as satisfied under the provision "satisfac-

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MADAPPA GANAPPA v. JAKI GHOSAL

tion for the smaller sum shall be entered on the decree" contained in Order XXI, rule 19 (b) The respondents were entitled, on the other hand, to the larger sum, consisting of their costs, but were only entitled to recover "so much only as remains after deducting the smaller sum" as prescribed in the said order The respondents, therefore, were the only parties entitled to take out execution at all and that execution could only be for the balance "after deducting the smaller sum" It cannot, therefore, be said that recovery of the part of their costs set off against that smaller sum was time-barred, because no application could have been made in respect of that part at all But it can be said that recovery of the balance would be time-barred under the ordinary rule of limitation applicable to the execution of decrees In fact it has been admitted that recovery of the balance would be time-barred under article 182 of the schedule to the Indian Limitation Act

Appeal dismissed

R R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

1915

July 21

NAZARALLI SAYAD IMAM (ORIGINAL PLAINTIFF) APPELLANT v BABAMIYA DULEYATIMSHA (ORIGINAL DEFENDANT) RESPONDENT*

Indian Contract Act (IX of 1872) section 23—Forest Act (VII of 1878)—License—Agreement to enter into partnership contravening the terms of the license—Agreement not unlawful

* Second Appeal No 836 of 1914

1915

NAZARALLI SAYAD IMAM v. BABAMIYA DUREYATIM SHA.

An agreement to share profits which would contravene the terms of the license as between the Forest Officer and the licensee is not forbidden by law nor would it defeat the provisions of any law.

Raghunath Lalman v. *Nathu Hirji Bhate*[1] distinguished.

SECOND appeal against the decision of E. Clements, District Judge of Khandesh, reversing the decree passed by B. G. Phatak, Subordinate Judge of Shirpur.

Plaintiff alleged that on the 19th August 1912 grass from nine coups within Chopda Range were sold by auction at Jalgaon by the forest authorities; that both the plaintiff and defendant had been to Jalgaon to bid for and secure the coups at the auction sale; that it was agreed that the coups should be secured in partnership between the parties but in the name of defendant alone; that they were to contribute half the sum each towards the deposit and to share equally in the resulting profit or loss; that the plaintiff offered his share in the deposit of Rs. 261 made by the defendant but the latter declined to accept the same and denied the partnership agreement. The plaintiff therefore sued to have it declared that he was entitled to recover half the share in the profit and loss made by the defendant in the grass contract for nine forest coups and recover the sum falling to his share as damages.

The defendant denied the partnership agreement and contended that the agreement was contrary to rule No. 2 of the license issued by the forest authorities. The terms of the rule being: "Without previously obtaining the permission of the Divisional Forest Officer this contract in whole or part of it or any interest in it should not be sublet or assigned to any one." That the suit being based on such an agreement was void under section 23 of the Indian Contract Act (IX of 1872).

[1] (1894) 19 Bom. 626.

1915

NAZARALLI SAYAD IMAM v BABAMIYA DUBEYATIM SHA

The Subordinate Judge on a preliminary issue found that the agreement was not unlawful under section 23 of the Indian Contract Act 1872 and held that the suit for damages was maintainable He observed as follows —

> To turn now to the agreement as given above I have to see whether the consideration or object of it was unlawful From what I have given above it will be seen that the parties never intended that the partnership shall come into existence without any permission of the Divisional Forest Officer Plaintiff has expressly stated in the plaint that the agreement was reduced to writing and every step to legalize it was to be taken in time to come It cannot therefore be said that the object or consideration of the agreement was unlawful so as to render it void under section 23 Indian Contract Act The rules also do not absolutely forbid any such partnership as was contemplated by the parties They only state that no such partnership shall be recognised by the forest authorities unless their permission in writing for the same is secured and a fine is prescribed to the ostensible contractor if any such partnership is formed and the sub contractor allowed to work independently The test to be applied to such agreements to determine whether they are void under section 23 is laid down on page 117 Second Edition of Pollock and Mullas Indian Contract Act That which has been forbidden in public interest cannot be made lawful by paying the penalty for it but an act which is in itself harmless does not become unlawful merely because some collateral requirements imposed for reasons of mere administrative convenience has been omitted Applying this test to the agreement in hand I find that the same cannot be unlawful between the parties to it though the forest authorities do not recognize it unless their permission is secured

The District Judge on appeal reversed the decree holding that the agreement of partnership in suit was unlawful and unenforceable

The plaintiff preferred a second appeal

Pendse with *H G Kulkarni* for the appellant — The lower Court erred in holding that the agreement was void under section 23 of the Indian Contract Act It is not opposed to public policy The condition in the license that no partner shall be admitted in the contract without the written permission of the Forest

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NAZARALI SAYAD IMAM v BABAMIYA DUBEYATINSHA

Officer is imposed merely for administrative purposes *i e*, the convenient collection of the revenue The terms of the license cannot override the statutory provisions of law and the licensee cannot be prevented from assigning part of his rights to a third party There is nothing to show that the terms of the license have the full force of a statutory enactment In this case the partnership was in the nature of financing the contractor and was therefore in no way opposed to public policy

P B Shingne for the respondent —There is nothing on the record of the case to show that the terms of the license are framed in accordance with the power to frame rules under section 31 of the Forest Act (VII of 1878), but they should be presumed to be so framed The alleged partnership is in the nature of sub-letting and hence it contravenes the 2nd clause of the terms of the license Any such sub-letting is also made penal and thus the agreement should be held void under section 23 of the Indian Contract Act 1872

SCOTT C J —The plaintiff sues the defendant to have it declared that he is entitled to recover half the share in the profit and loss made by the defendant in the grass contract for nine forest coups and to recover the sum falling to his share as damages and costs The defendant denied the alleged partnership in the terms set up in the plaint and contended that the suit was bad as being based on an agreement, if there was such an agreement which was void under section 23 of the Indian Contract Act

The learned Subordinate Judge found that the agreement was not unlawful under section 23 of the Indian Contract Act Therefore he directed that a preliminary decree should be drawn up on that issue

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NAZARALLI SAYAD IMAM v BABAIMIYA DUREYATIM SHA

The learned District Judge reversed the preliminary decree and remanded the case to the lower Court The appellant has appealed to this Court on the ground that the lower Court erred in holding that the agreement of partnership was unlawful But notwithstanding the pendency of the appeal it appears that the suit has been tried in the first Court on the basis of the judgment of the District Court being correct That, however, need not prevent us from disposing of this appeal We are of opinion that the judgment of the District Court is not correct The section of the Indian Contract Act which is relied upon is section 23 which says —"The consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law" and it is contended that because the license given by the Forest Officer prohibits the assignment of a share or interest in the lisense, therefore, this agreement to pay half the profits to the plaintiff falls within the words of section 23 above referred to We have examined the Forest Act, and we have heard all that can be said by the pleader for the respondent in support of the judgment of the Court below We are unable to find any provision of statute law which makes it obligatory upon the parties to observe the conditions of the license Of course the license can be revoked by the Forest Officer if the licensee disregards the terms of it It does not follow from that that an agreement to share profits which would contravene the terms of the license as between the Forest Officer and the licensee is forbidden by law, or would defeat the provisions of any law The learned District Judge has relied upon the case of *Raghunath Lalman* v *Nathu Hirji Bhate*,[1] which however, is distinguishable That was a case under the Opium

[1] (1894) 19 Bom 626

Act, under which the sale of opium was only permitted subject to such conditions as the Commissioner might, from time to time, prescribe. Therefore, the sale of opium by partners, who could not enter into partnership without contravening the condition prescribed, would violate the provisions of the Opium Act. We set aside the decree of the District Judge upon the preliminary issue, and direct the Judge of the lower Court to dispose of the case on the merits. The respondent must pay the costs in this Court and the lower appellate Court upon the preliminary issue.

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NAZARALLI SAYAD IMAM v. BABAMIYA DURETATIM SHA.

Decree reversed.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

GANGABAI WIDOW v. SONABAI COWASJI GHEEVALA AND ANOTHER.* 1915 *December 10.*

Vendor and purchaser—Conveyance of property by an administratrix having a beneficial interest therein—No words of limitation in the agreement to convey specifying whether it was qua administratrix or qua beneficial owner—Principle to be applied in ascertaining in what capacity the administratrix acted.

Where a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must be taken to be conveying the highest estate he has; that is to say, if an executor having a one third personal beneficial interest in the estate purports to convey the whole of it without qualification or limitation, he must be taken to be conveying in his character as executor and not in that of one having a beneficial interest only in a fraction of the whole estate purported to be conveyed.

In re Venn & Furze's contract[1] followed.

No distinction can be maintained in principle between actual conveyances and agreements to convey for the purposes of applying this general rule.

*O. C. J. Suit No. 397 of 1914.

(1) [1894] 2 Ch. 101.

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GANGABAI v. SONABAI

THE plaintiff filed this suit praying for specific performance of an agreement to sell certain property in Sheikh Memon Street, alleged to have been entered into on the 18th of January 1914 between the plaintiff and the defendant who was the administratrix of her deceased father. The plaintiff further prayed for rectification, if necessary, of the aforesaid agreement by the insertion therein of words to show that the defendant had entered into the agreement in her capacity as administratrix and not in her private capacity as having a beneficial interest to the extent of $\frac{6}{7}$th in the said property. The defendant in her written statement alleged *inter alia*, that the agreement was not binding on her, because her signature to it had been obtained by misrepresentation and fraud, and further that she was never asked to, neither did she enter into the said agreement as administratrix of her deceased father's estate. The material portion of the agreement sued on being Exhibit E in the case read as follows —

This bargain paper is made this day the 18th of January in the year 1914 between Bai Sonabai Cawasji Nassarwanji Gheewala of Bombay Parsee inhabitant who will hereafter be called the vendor of the one part and Bai Gangabai widow of Gangadas Rangildas of Bombay Hindu inhabitant who will hereafter be called the purchaser of the other part. The said vendor has made a bargain to sell (? the property) to the said purchaser for Rs 33,750.

The agreement was signed by the parties as follows —

Sonabai Cowasji Gheewalla

Gangabai widow and executrix of Shah Gangadas Rangildas

The following among other issues were raised at the trial on behalf of the 1st defendant:

1 Whether the agreement referred to in the plaint was intended to be an agreement for the sale by the 1st defendant as administratrix of her father's estate of the whole of the property in question?

2 Whether the plaintiff is entitled to rectification of the alleged agreement for sale?

3 Whether the plaintiff is entitled to specific performance of the said agreement?

After deciding the first two issues above mentioned in the manner stated in the judgment, the learned judge refused to grant specific performance of the agreement on the ground that the 1st defendant was under a very serious mistake and delusion with regard to the price to be paid for the property in question

As regards the 2nd defendant the suit was dismissed with costs at the first hearing on the ground that the plaint disclosed no cause of action against her

Jinnah, *Wadia* and *Mirza* for the plaintiff

Weldon and *Moos* for the 1st defendant

Taraporevala and *Dadachanji* for the 2nd defendant

BEAMAN, J —The plaintiff in this suit seeks specific performance of an agreement to sell a certain property in Shaikh Memon Street alleged to have been entered into on the 15th of January 1914, between the said plaintiff and the defendant Sonabai, administratrix of the estate of her deceased father The plaintiff also asks for the rectification of the agreement, if necessary, by the insertion of words not therein to be found at present making it clear that the contract was entered into by Sonabai as administratrix Before the case was opened, the learned counsel for the plaintiff asked leave to raise an additional issue which implies, as I understand it, the abandonment of this supplementary prayer for rectification No evidence has been led in the course of this trial to prove any mutual mistake in the actual wording of the agreement, Exhibit L but in its final form the plaintiff's case amounts to this, that

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inasmuch as Sonabai was the administratrix and purported to convey the whole of the property in suit without any qualification or words of limitation, she must be presumed in law to have agreed to convey the highest estate she was capable of conveying, and that too without the need of any designatory words such as administratrix I have been referred to certain cases upon this subject, and notably the case of *Biraj Nopani* v *Pura Sundary Dasee*[1] and the very informing case of *In re Venn & Furze's contract*[2] Ever since the trial commenced I have bestowed my best attention upon this interesting point, and although it was only in counsel's concluding arguments that the case of *In re Venn & Furze's contract*[2] was brought to my notice, I had independently arrived at the principle, to which I think Stirling J's judgment in that case gives very clear expression It appears to me, as a general principle, that where a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must always be taken to be conveying the highest estate he has, that is to say, if an executor having a one-third personal beneficial interest in the estate purports to convey the whole of it without qualification or limitation, he must be taken to be conveying, in his character as executor and not in that of one having a beneficial interest, only in a fraction of the whole estate purported to be conveyed Upon this general principle, which I believe to be universally valid and applicable, exceptions may be grafted with reference to the particular facts of particular cases Thus, where, upon the facts found, the Court is satisfied that both the parties must have been aware that the intention of the vendor was to restrict what was being sold to his personal lesser interest and where the Court also finds that that was the intention

(1) (1914) 42 Cal 56 (2) [1894] 2 Ch 101

of the vendor, then, no doubt, the conveyance would only be effectual to that extent But that is really no exception at all to the general rule I have stated It appears to me to make not the slightest difference whether in such circumstances, the vendor is expressly designated as executor or administrator if, in fact, and to the knowledge of the purchaser, he be an executor or administrator and purports to convey without limitation the whole estate Nor do I think any distinction can be maintained in principle between actual conveyances and agreements to convey for the purposes of applying this general rule If I am right so far, it is obvious that there is no case for rectification here, because there is no need for it If the agreement of the 18th of January 1914 was really the agreement of the administratrix, then, in my opinion, it would be as much an act of Sonabai in that capacity whether or not she be described on the paper as administratrix [His Lordship then dealt with the questions of fact which are not material for the report of this case]

Attorneys for the plaintiff Messrs *Tyabji Dayabai & Co*

Attorneys for the 1st defendant Messrs *Pocha & Co*

Attorneys for the 2nd defendant Messrs *Dubash & Co*

M F N

[*Note* —The plaintiff appealed from the above judgment and at the hearing of the appeal the parties at the suggestion of the Court agreed to a decree for specific performance being passed on the plaintiff paying all costs of the first defendant and agreeing to pay an enhanced price for the property in question]

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

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July 26

KASTURCHAND LAKHMAJI AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS *v* JAKHIA PADIA PATIL AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS °

Construction of deed—Deed of sale—Contemporaneous agreement to reconvey on payment of consideration—Lease for a term of years—Sale deed amounts in effect to a deed of mortgage—Debt treated as continuing—Property treated as security for repayment of debt

The plaintiffs executed in favour of the defendants a sale deed of lands for Rs 2 500 a large part of which consisted of old bond debts Contemporaneously with it two more documents were executed between the parties One of them was an agreement of reconveyance executed by the defendants to the plaintiffs agreeing to reconvey the lands (1) if the sum of Rs 2 500 was repaid at a certain specified date and (2) on repayment with interest of sums if any spent by the defendants upon the lands or of any further sums borrowed from them The other document was a lease executed by the plaintiffs under which they took the lands on lease from the defendants for a period of ten years at an annual rental of Rs 287 which seemed to have been made up of Rs 62 the Government assessment on the lands and Rs 225 reserved as rent representing nine per cent on the principal sum of Rs 2 500 The plaintiffs filed the present suit for a declaration that the sale deed passed by them was in reality a mortgage and for an order allowing the plaintiffs to redeem the lands on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists Relief Act The trial Judge was of opinion that the transaction was a sale while the District Judge on appeal held it was a mortgage by conditional sale The defendants having appealed —

Held that the transaction was in reality a mortgage by conditional sale inasmuch as the apparent price viz Rs 2 500 was not the real price of the sale but was treated and regarded as a continuing debt between the parties the property being made security for the repayment of that debt

Maruti v Balaji [1] followed

° Second Appeal No 988 of 1914

[1] (1900) 2 Bom L R 1058

Second appeal from the decision of T D Dikshit, District Judge of Thana reversing the decree passed by B D Sabnis, Subordinate Judge at Alibag

Suit for declaration

The plaintiffs sued for a declaration that a sale transaction dated 14th August 1902 was only of the nature of a mortgage and for an order allowing them to redeem the property on payment to defendants the sum found due on accounts taken under the Dekkhan Agriculturists' Relief Act

The deed in question was in form a deed of sale It purported to sell lands worth about Rs 5,000 for the sum of Rs 2,500, of which Rs 2 125 were old bond-debts and Rs 375 were cash advances The material provisions of the deed were as follows —

After making up accounts of the above bonds and after giving credit for the receipt given to you by us the amount due today is Rs 2 125 and the amount received today for making payments &c to other people and for the house expense is Rs 375 Together with the total amount due to you is Rs 2 500 (two thousand five hundred) In lieu of this we give you by a sale deed property out of the land mortgaged in the above bonds and besides that other property of the following village lying within the limits of Tukadi and Jhilla Colaba Sub Tukadi and Taluka Alibag

In all eighteen acres and twentynine gunthas field land built and a part waste land and with all the crop of reaped corn on the land and the house outhouse with land—all this property as written above we have sold to you and you have taken possession and charge of it Now we have no claim or right of heirship of any kind over it If anybody at any time claims a right of any kind to it we shall clear it all with our expense Our father enjoyed the property for many years Now I enjoy it You may now enjoy the same from generation to generation This property is neither mortgaged nor gifted nor sold to anybody

On the same day and as part of the same transaction two more deeds were passed between the parties

The defendants executed in favour of the plaintiffs an agreement for reconveyance of the lands to the

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KASTUR CHAND LAKHMAJI v. JAKHIA PADIA

plaintiffs, on fulfilment of conditions which were thu expressed —

In all eighteen acres and twentynine gunthas of land with a house an o house and land this property we have purchased from you for a sum Rs 2 500 (two thousand and five hundred) on the 14th day of August of t year 1902 The property purchased will be sold to you on the followin terms only The terms are —

If you pay us at any time between Shake 1824 to Shake 1833 a period ten years in the month of Margasheersha the most busy month the sum Rs 2 500 (two thousand five hundred) we shall receive them and will make sale deed of he above property in your favour at your cost

2 The above property you have taken from us on a lease of ten years an have agreed to pay us every year Rs 287 (two hundred and eighty seven) a separate lease bond has been taken for it That sum you must pay us fron year to year in the month of Margasheersha from Shake 1824 to Shake 183 without asking for any remission and without hesitation and excuse of wan of rain &c

3 The right which you have obtained from us in virtue of this writing of purchasing the above property is given by us for yourself alone You are not to transfer it to anybody In case you do it it will not be valid and we shall not acknowledge it

4 With respect to the above property if we are obliged somehow or other to spend some amount after it or if you were to borrow some money hereafter we shall receive all the amounts with interest first and then we shall pass the sale d ed of the above property in your name

5 You shall have to bear the expense of the sale deed registration &c and every sort of expense that will be necessary

6 According to this agreement when you will change or in the same year when the amount of rent runs into arrears and on the day of Paoosh Sood Pratipada of Shake 1833 this ageement will be considered null and void and from the same day or thereafter all the management &c of the kind of the said property will be done by us according to our will you will then according to this agreement have no claim of any kind over it

7 According to the terms of agreement we are to receive from you every year in the month of Margasheersha from Shake 1824 to Shake 1833 R 287 (two hundred and eighty seven) In the year when the above amount will remain to be paid in time on the Sood Pratipada of Paoosh of the same year this agreement will be considered as cancelled We shall not only not resell the

said property to you but it will be left to our choice whether you should be allowed the whole management for the remaining term or not

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The plaintiffs passed to the defendants a lease which recited that they had leased the lands from the latter for a period of ten years at an annual rental of Rs 287 It appeared that the amount of Rs 287, was made up of Rs 62, Government assessment on the lands, and Rs 225, interest on Rs 2,500 at nine per cent per annum

The suit was filed on the 20th December 1911

The Subordinate Judge held on a preliminary issue raised by him that the transaction in suit was a sale and not a mortgage, on the following grounds —

There is no provision in the agreement about the taking of any accounts and there is nothing therein to show that the amount was treated as a debt The case of *Vasudeo* v *Bhau* in I L R 21 Bom 528 is an authority for the proposition that to make a mortgage there must be a debt This proposition was accepted by the Allahabad High Court in the case of *Ghulam Nabi Khan* v *Nia Un Nissa* (I L R 33 All p 337) where it was held that ' if there be a right to redeem property from a debt there must also be the correlative right to enforce payment of the debt In the present case to leave no stone unturned the plaintiffs being agriculturists I called the books of the firm relating to the transactions between the parties and examined them but found that the previous mortgage transactions were closed on the date of the sale deed and new *Khatas* opened evidencing the new relationship of landlord and tenant and showing receipts of rent the transaction being thus thenceforward treated as one of absolute sale The plaintiffs pleader relies upon two circumstances as showing that the parties intended the transaction to be one of mortgage and not a sale The first is that the agreement gives the defendants power to recover the amount they may have occasion to spend on the property as also any fresh advances that may subsequently be made to plaintiffs with interest before executing the reconveyance The second is that the amount of rent to be paid to defendant by the plaintiff was fixed in cash and not in kind and that the amount is just sufficient to cover the amount of interest due on Rs 2,500 at 9 p c per annum and the Government assessment which is about Rs 62 including local cess On a little consideration it will however be seen that both these circumstances are quite compatible with the nature of a sale transaction It is difficult to see why the vendee should not try to have all his expenses on the property

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recouped in case of re purchase by the vendor and to ensure a certain rate of interest on his outlay in the meanwhile The amount of consideration for every sale is as we well know almost always fixed with due regard to the interest that the property purchased may yield in the shape of profits As in the present case there was the stipulation as to repurchase it is *therefore* no wonder that the vendors made sure of recovering so much interest on their outlay by fixing the rent accordingly There are cases supporting the view that a mere stipulation as to payment of interest is not by itself conclusive to show that the transaction is not an absolute sale but a mortgage As a mortgage is to secure a debt we have therefore as already *observed* to see whether there is in this case a debt *i e* whether the original purchasers have left to them the power to recover the sum named as the price of the repurchase If there is no such power there is no mortgage (Gour s Transfer of Property Act Vol II p 646 para 994) In the present case the defendants have clearly got no power to recover the amount fixed as *the price It is no doubt true that such a test is inapplicable to an usufructuary* mortgage as observed in the case of *Tukaram* v *Ramchand* (I L R 26 Bom 252 257) but then the present case is not one of usufructuary mortgage since ostensible vendors are not to receive the rent and profits accruing from the property and to appropriate them in lieu of interest but that they are as the plaintiffs admit simply to receive so much interest and assessment and nothing more

This decree was on appeal reversed by the District Judge, who found that the transaction in question was in reality a mortgage by conditional sale for the following reasons —

The question then arises whether the parties intended that the consideration should be treated as a debt It is obvious that the possession was not intended to be transferred to the ostensible purchaser The assessment or the land including local cess amounts to Rs 61 5 9 Deducting this from Rs 287 the balance of Rs 22[illegible] represents interest at 9 per cent per annum It was to be paid every year in the month of *Margashirsha for ten years up to the Shake* year 1833 without fail irrespective of the fact whether there was a drought or failure of the crop The right to repurchase the property was made dependent not only on the repayment of the consideration money but also on the regular and full payment of the rent secured Then the fourth clause stipulates that if the purchaser be required to spend any money on the property or if any fresh advances of loan were made the plaintiffs would not be entitled to the reconveyance of the property without repayment of those sums with interest *If there was the only agreement to repurchase the property*

on payment of a specific sum of money within a particular period and the amount was not to be treated as a debt payable with interest all these stipulations would have been unnecessary. Making the repurchase conditional on the full payment of the amount of rent which represented interest at 9 per cent. per annum as well as the amount spent by the defendant on the property together with interest and the other debts advanced clearly show that the property was considered to be a security for all these sums and all these sums were to be treated as debts.

I have no doubt that the parties treated the property as security for the debt and the net amount of rent as interest.

The cases cited by Mr. Bhagwat viz. 12 All. 387 and 33 All. 337 are distinguishable. In both these cases the purchaser was immediately put in possession as owner and the condition was to resell the property on payment of a specified amount only. The payment of rent or interest was not a condition precedent. The transaction was effected by two documents instead of three and the purchaser agreed to resell the property as an act of charity and kindness and not of right.

The defendants appealed to the High Court.

Jayakar with *G. S. Rao*, for the appellants.

Coyaji with *A. G. Desai*, for the respondents.

The following cases were cited in argument:—

Maruti v. *Balaji*[1]; *Bapuji Apaji* v. *Senavaraji Marwadi*[2]; *Abdulbhai* v. *Kashi*[3]; *Govinda* v. *Jesha Premaji*[4]; *Vasudeo* v. *Bhau*[5]; *Ayyavayyar* v. *Rahimansa*[6]; *Bhagwan Sahai* v. *Bhagwan Din*[7]; *Syed Ashgar Reza Khan* v. *Syed Mahomed Mehdi Hossein Khan*[8]; *Madhavrao Keshavrao* v. *Sahebrao Ganpatrao*[9]; *Nagindas* v. *Nanabhai*[10]; *Balkrishna* v. *Mahadeo*[11]; *Wajid Ali Khan* v. *Shafakat Husain*[12]; *Ghulam Nabi Khan* v. *Niaz-un-nissa*[13].

(1) (1900) 2 Bom. L. R. 1058.
(2) (1877) 2 Bom. 231.
(3) (1887) 11 Bom. 462.
(4) (1878) 7 Bom. 73.
(5) (1896) 21 Bom. 528.
(6) (1890) 14 Mad. 170.
(7) (1890) L. R. 17 I. A. 98.
(8) (1903) L. R. 30 I. A. 71.
(9) (1914) 39 Bom. 119.
(10) (1914) 16 Bom. L. R. 774.
(11) (1896) 22 Bom. 520.
(12) (1910) 33 All. 122.
(13) (1910) 33 All. 337.

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KASTUR CHAND LAKHMAJI v. FAKHIA PADIA.

BATCHELOR, J.—The suit out of which this appeal arises was brought for a declaration that a certain apparent sale dated the 14th August 1902 was in reality a mortgage and for an order allowing the plaintiffs to redeem the property on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists' Relief Act.

The question, which has divided the learned Judges below, was whether the transaction of the 14th August 1902 was an out and out sale or a mortgage by conditional sale. The learned trial Judge was of opinion that it was a sale, while the learned District Judge held that it was a mortgage by conditional sale.

It may be observed that whether the transaction be regarded as a sale or a mortgage the plaintiffs are still within time to recover their land. For, on the footing that the transaction was a sale with a right of repurchase in the plaintiffs the plaintiffs are still entitled to repurchase. The object of the suit, therefore, seems to be on the plaintiffs' part to obtain a decree for redemption under the Dekkhan Agriculturists Relief Act which would enable them to open their accounts with their creditors from the beginning, and it is this reopening of the accounts which the defendants resist.

The question of the true character of this transaction must be answered by reference to the three contemporaneous documents, Exhibits 55, 32 and 56, in which the transaction is embodied. Exhibit 55 is the sale deed by the plaintiffs to the defendants. Exhibit 32 is the defendants' agreement to reconvey to the plaintiffs, and Exhibit 56 is the rent note passed by the plaintiffs to the defendants. All three documents were admittedly executed on the same day at the same sitting. The important recital in the sale deed, Exhibit 55, is couched in the following words:—"After making up

accounts of the above bonds (mortgage bonds) and after giving credit for the receipt given to you by us, the amount due to day is Rs 2 125, and the amount received to day for making payments to other people and for house expenses is Rs 375 Thus the total amount due to you is Rs 2,500 In lieu of this we give to you by a sale deed" property, which the instrument thereafter specifies In the agreement, Exhibit 32, it is provided as follows —"This property (described) we have purchased from you for a sum of Rs 2,500 The property purchased will be sold to you on the following terms only The terms are (1) If at any time between Shake 1824 and Shake 1833 in the month of Margashirsha you pay us the sum of Rs 2,500 we shall receive it and pass a sale deed of the property in your favour at your cost (2) The above property you have taken from us on a lease of ten years and have agreed to pay us every year Rs 287 A separate lease has been taken for that This sum you must pay to us from year to year in the month of Margashirsha from Shake 1824 to Shake 1833 (3) The right which you have obtained from us in virtue of this writing of purchasing the above property is given by us to yourselves alone You are not to transfer it to anybody In case you do transfer it, the transfer will not be valid and we shall not acknowledge it (4) With respect to the above property if we are obliged by any means to spend any sum upon it, or if you hereafter borrow moneys from us we shall receive all these amounts with interest first and then only shall we pass to you a sale deed of the above property" The rent note, Exhibit 36, provides that annually for the ten years mentioned the plaintiffs shall pay to the defendants rent of Rs 287

It remains to determine what is the true contract to be collected from these documents Was it a contract of sale or a contract of mortgage by conditional sale In the

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course of the argument numerous cases were cited to us, but they were, we think all decided on their own particular facts The only case where the facts were substantially similar to those now before us is *Maruti* v *Balaji*[1] where the Court pronounced in favour of a mortgage The principle which governs the cases seems to be clear enough The Court has to decide between an out and out sale for an agreed price and a mere transfer of the property, the subject of the sale deed, as security for a loan Thus the principal point to be cleared up is, whether the apparent price, in this case Rs 2,500, was the real price of a sale or was treated and regarded as a continuing debt between the parties, the property being made security for the repayment of that debt The three documents must of course be read as a whole, and the intentions of the parties must be gathered from the provisions of the documents We begin with this that the mere agreement to reconvey does not necessarily signify that *the transaction is a mortgage* It seems to us, however, that two things must be remembered in this context One of them is the notorious reluctance of Indian peasants to sell their land, a reluctance which is judicially noticed and historically explained by Sir Michael Westropp in *Bapuji Apaji* v *Senavarji Marvadi*[2] And the second thing to be remembered is that, in the case now before us on the assumption that the parties intended an out and out sale, there is no assignable reason why the defendants should have promised the plaintiffs to reconvey the property to them if they repaid the purchase money That is a point which, we think, is not without importance, and it was, we observe, allowed to weigh with the Court in *Patel Ranchod* v *Bhulabhai*[3] As is said there by Mr Justice Ranade, so we may say here, that on the

[1] (1900) 2 Bom L R 1058 [2] (1877) 2 Bom 231
[3] (1896) 21 Bom. 701

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case made by the defendants there was no occasion for the covenant to reconvey on the repayment of the money within a given time It may also be remarked that though the parties must of course be held to the contract which they have made and the Court cannot make a new contract for them yet in ascertaining the true nature of the contract the Court must follow the injunction so frequently laid down by the Privy Council that "deeds and contracts of the people of India ought to be liberally construed The form of expression, the literal sense is not to be so much regarded as the real meaning of the parties which the transaction discloses" *Hunoomanpersaud Panday v Mussumat Babooee Munraj Koonweree* (1)

Now from the documents which we have read it is clear in the first instance that although the sale deed recites that the property was sold in lieu of the payment of the debt due the sum of Rs 2 500 which formed the purchase price was in its origin a debt and that it continued as a debt seems to us to be indicated by clause 4 of Exhibit 32 which we have quoted For that clause as we understand it shows that the repayment of the Rs 2 500 and the repayment of any fresh advances which the plaintiffs might take from the defendants were to be on one and the same footing in other words the old relation of debtor and creditor was continued and the Rs 2 500 was regarded as an outstanding loan to be reckoned with any other new loans which might thereafter be made to the plaintiffs It is also we think material to note that by the terms of the agreement it was provided that within the stipulated period of ten years whensoever the plaintiffs might elect to make to the defendants the payment due to them the defendants would reconvey to the

(1) (1856) 6 Moo I A 393 at p 411

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plaintiffs That provision seems to us to suggest the inference that the defendant-creditors were looking only to the recovery of their money, not to the ownership of the land It was sufficient to provide for the recovery of the principal sum, Rs 2 500, without interest, because the interest due on that sum was already *provided for under the guise of rent reserved by* Exhibit 56 That rent was in the aggregate Rs 287 It is found by the lower Court, and the finding has not been challenged, that this aggregate was made up of Rs 62 on account of the Government Assessment and Rs 225 net rent Now, the Rs 225 reserved as rent work out to exactly 9 per cent on the principal sum of Rs 2 500, and it was not contested before us that that was the principal upon which the sum of Rs 225 was fixed That circumstance seems to us to furnish yet another indication that the transaction with which we *are dealing was a transaction of mortgage in which the* mortgagee was interested only in securing a sufficient interest on his investment And strong corroboration of that conclusion is supplied by the fact that the assessment due to Government on the land continued to be paid by the plaintiffs as well after as before this transaction of apparent sale

The learned Judge of the lower appellate Court thus had good reason for his finding that the Rs 2 500, was and continued to be a debt We have given our reasons for adopting the same conclusion, because it seems to us that the question, depending as it does on the construction of documents is open in second appeal, though we notice that in *Maruti v Balaji*[1] it was said that " a finding on such a point would ordinarily be a finding of fact which would be binding on this Court in Second Appeal

[1] (1900) 2 Bom L R 1058

Two other circumstances may be alluded to as strengthening the conclusion which we have reached One of them is that in spite of the terms of the deed of sale, the possession remained with the plaintiffs, the vendors, and was not made over to the defendants And the second circumstance is that the lower appellate Court finds as a matter of fact that the value of the mortgaged properties was Rs 5,000 that is, exactly double the sum fixed as the consideration of the apparent sale

In view of all these *indicia* of a mortgage we do not think that the learned Judge's conclusion is displaced by the argument that the documents, which we have before us, do not disclose any such mutuality of remedies as the Courts have held to be ordinarily characteristic of the relation between mortgagor and mortgagee This requirement was considered by a Full Bench of this Court in *Tukaram* v *Ramchand* (1) and it was there observed that "the *dictum* is often cited in our Courts without precise appreciation of its meaning, and in any case it has a very limited application to the ordinary mortgages with which we are familiar in the mofussil in India These words are, we think, apt to the circumstances of the present appeal where the mortgage if we are right in regarding it as a mortgage, falls under section 58 (*c*) of the Transfer of Property Act, being a mortgage by conditional sale In other words the transaction was *ex facie* a sale and a deed of sale would clearly be an inappropriate place in which to embody the reciprocal remedies of a mortgagee as mortgagee

Lastly, it was contended that the transaction could not be regarded as a mortgage because there was no provision for accountability There is, however

(1) (1901) 26 Bom. 252 at p. 257

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provision for accountability by the mortgagor as we have already noticed, and the circumstances of the case leave no room for accountability by the mortgagee, inasmuch as the mortgagee never went into possession of the mortgaged property, but received an annual rent in lieu of the rents and profits

These are all the considerations which have been advanced to us on the one side and the other, and on a review of all of them we are satisfied that the weight of evidence is in favour of the view which commended itself to the learned Judge of the lower appellate Court His decree must therefore be affirmed and this appeal dismissed with costs

Decree affirmed

R R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

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BAI ATRANI WIDOW OF THAKUR KUNVER SAHEB BAPU SAHEB (ORIGINAL DEFENDANT No 1) APPLICANT v. DEEPSING BARIA THAKOR (ORIGINAL PLAINTIFF) OPPONENT *

Civil Procedure Code (Act V of 1908) section 115—High Court—Extra ordinary Civil Jurisdiction—Temporary injunction restraining a Hindu widow from adopting—Application against the order—Case meaning of—Jurisdiction under section 5 of Bombay Regulation II of 1827—High Courts Act (24 and 25 Vic Ch 104) section 9—General Repealing Act (XII of 1873)

In the course of a pending suit the first Court granted a temporary injunction restraining defendant No 1 from making an adoption but afterwards dissolved it On appeal the District Judge granted the temporary injunction The defendant No 1 having applied to the High Court against the order *

* Civil extraordinary application No 43 of 1915

preliminary objection was taken that the application was not competent under section 115 of the Civil Procedure Code —

Held overruling the objection that the application was competent under section 115 of the Civil Procedure Code (Act V of 1908) as the order was a case decided in which no appeal lies within the meaning of the section

Held further that the order was open to consideration under the wider provisions of section 5 of Regulation II of 1827 continued in force by virtue of section 9 of the High Courts Act 1861 and saved from repeal by the operative sections of the General Repealing Act (XII of 1873)

Per BATCHELOR J — The word case which occurs in section 115 of the Civil Procedure Code (Act V of 1908) is a word of wide or comprehensive import and clearly covers a far larger area than would be covered by such a word as suit or appeal

Inasmuch as section 115 is merely an empowering section granting certain jurisdiction to the High Court and as the use or exercise of that jurisdiction will within the prescribed limits be regulated by the discretion of the High Court the section ought to receive rather a liberal than a narrow interpretation

THIS was an application under extraordinary jurisdiction against an order granting a temporary injunction passed by B C Kennedy, District Judge of Ahmedabad, in appeal from an order passed by B G Tolat, Subordinate Judge at Godhra

The plaintiff sued to have it declared that he was entitled to the Talukdari estate of Sonipur and Bhamaria as the son (legitimate or illegitimate) of the late Thakor Kunvar Saheb He also prayed for a permanent injunction against defendants Nos 1 to 3, who were widows of the late Thakor restraining them from making any adoption The plaintiff also applied for a temporary injunction restraining the defendants from making any adoption pending the disposal of the suit The Subordinate Judge granted the temporary injunction

The defendant No 1 in showing cause against the order contended *inter alia* that the plaintiff was not a son of the late Thakor that she was authorized to make adoption by the late Thakor or by his registered will, and that the injunction would operate greatly to her prejudice

The Subordinate Judge dissolved the injunction, on the following grounds —

If the plaintiff is really the son of the deceased Thakor the intended adoption by defendant No 1 will confer no civil rights on the adopted son That adoption will be null and void as no person having a male issue can make a valid adoption If on the other hand the plaintiff is not found to be the son of the late Thakor, he has no cause of action and has nothing to lose The balance of inconvenience is more on the side of the defendant No 1 than to the plaintiff Courts generally decline to grant a temporary injunction if the plaint and affidavits filed by parties show on the face of them that the case is not one for a perpetual injunction or for specific performance Court doubts whether perpetual injunction could at all be granted under section 54 of the Indian Specific Relief Act under the circumstances appearing from the pleadings of the case It is the inherent right of every Hindu widow to make an adoption unless she is expressly forbidden to do so by her husband In this case the husband of defendant No 1 specially gives her an authority to adopt under his registered will That direction may not be fulfilled in case defendant No 1 or the mother of the son to be given in adoption dies in the meanwhile The fact that serious results among Hindus may occur from the prevention of an adoption ought to incline the Court to proceed with caution No case of an injunction to restrain an adoption has been shown to me by the plaintiff The pleader for defendant No 1 relies on 13 Bom p 56 The Court under the circumstances of the case thinks that this is not a fit case wherein injunction should be allowed to continue It may be stated that an adopted son is a recognised substitute for a natural son He comes in with all the rights and privileges of a natural son now the question is can the Courts grant an injunction to a man restraining him to get or have a natural son? The reply is evidently in the negative It follows then that no such injunction can be granted to restrain an adoption

The plaintiff having appealed against the order, the District Judge reversed the order and granted the injunction on the following grounds —

The question is whether this is a proper case I do not propose to go into the facts and record findings on them even *prima facie* Plaintiff alleges he is a *dásiputra* Defendant No 1 denies this and says also that even if defendant is a *dásiputra* he cannot succeed to an impartible Raj

Defendant No 1 sets up a will authorising her to adopt. The plaintiff denies the validity of this will But the defendant No 1 would it seems in any case have the power to adopt. An so in her absence the other widows would

under certain conditions have the same right The Thakor being well provided with widows it does not seem as if there was any peril to the spiritual welfare of the deceased from the adoption being postponed

On the other hand it does appear as if the adoption might prejudice the plaintiff The boy adopted could not be adopted without the sanction and approval of the Collector and this would in the eyes of the tenants and retainers act as a sort of representation that Government disbelieved the case of the plaintiff The nature of the suit would be entirely changed The point at issue is whether the defendant No 1 can legally adopt It is undesirable in my opinion that the plaintiff should be forced to get a declaration that an already performed adoption is illegal and recover the estate from the possession of a boy so adopted With the possible inconvenience to the adopted boy and his family I have no concern We have had examples however that the claims of a next heir have led to great trouble and litigation even after the question of heirship has been settled

The defendant No 1 applied to the High Court

At the hearing a preliminary objection was raised by the opponents that no application could be entertained by the High Court against an order granting an interlocutory injunction

H C Coyajee with *G N Thakore*, for the opponent, in support of the preliminary objection —The injunction having been granted by way of interlocutory order pending the hearing of a case the present application to the High Court is not competent under section 115 of the Civil Procedure Code The hearing of the suit has just commenced there has been no ' case ' which has been "decided See *Chattar Singh* v *Lekhraj Singh*[1], *In re Nizam of Hyderabad*[2] *Farid Ahmad* v *Dulari Bibi*[3] *Nand Ram* v *Bhopal Singh*[4] *Damodar* v *Ragunath*[5] *Motilal Kashibhai* v *Nana*[6] There would be no end to litigation if every interlocutory order is subject to the application to the High Court

(1) (1883) 5 All 293
(2) (1886) 9 Mad. 256
(3) (1884) 6 All 233
(4) (1912) 34 All. 592
(5) (1909) 26 Bom 551
(6) (1892) 18 Bom 35

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G S Rao for the applicant —The present application is perfectly competent under section 115 of the Civil Procedure Code See *Dhapi* v *Ram Pershad*[1] The word "case" is a term of wide import it is much wider than the words 'suit' or 'appeal' The case of *Motilal Kashibhai* v *Nana*[2] is in my favour

Further, the High Court has also the power to interfere under Bombay Regulation II of 1827, section 5 It is still in force See section 9 of the High Courts Act, and Act XII of 1873, section 1, paragraph 3

Coyajee in reply —The case of *Motilal Kashibhai* v *Nana*[2] *is not against me In that case there was no* appeal under section 585 of the Civil Procedure Code (Act XIV of 1882) Here, there is an appeal under section 104 and Order XLIII of the Civil Procedure Code (Act V of 1908)

The powers of the High Court under Regulation II of 1827 have to be sparingly exercised See *Shiva Nathaji* v *Joma Kashinath*[3] and *Mahadaji Govind* v *Sonu bin Davlata*[4]

[The application was then heard on the merits]

BATCHELOR J —This application arises in the course of a pending suit in which the plaintiff claims to be the son, or at least the *dasiputra*, of a certain deceased Thakor, with his plaint the plaintiff presented an application praying for an injunction against the Thakor s senior widow, restraining her from making *an adoption pending the decision of his status* The learned Subordinate Judge at first granted a temporary injunction against the widow, but afterwards for reasons with which we are not at present concerned he dissolved it The plaintiff appealed to the District Judge, who has granted a temporary injunction

(1) (1887) 14 Cal 768
(2) (1883) 7 Bom 341
(3) (1892) 18 Bom 35
(4) (1872) 9 B H C R 249

restraining the widow from adopting pending the decision of this suit This application is made in order that the District Judge's injunction should be revised by this Court

Mr Coyaji for the plaintiff takes the preliminary point that the application is not competent under section 115 of the Civil Procedure Code, and he relies mainly upon such cases as *Chattar Singh* v *Lekhraj Singh*[1], *In re Nizam of Hyderabad*[2] and *Farid Ahmad* v *Dulari Bibi*[3], where the Courts have held that there is no jurisdiction under section 115 to revise an interlocutory order when there is an appeal from the final decree thereafter to be passed These Allahabad cases were, however, considered in *Dhapi* v *Ram Pershad*[4], where the learned Judges of the Calcutta High Court took a different view, and having regard to the comprehensiveness of the word 'case' occurring in section 115 and to the possibility of grave injustice which might result from the adoption of the other principle, decided that under section 115 of the Code the Court had jurisdiction to revise an interlocutory order This decision was considered by Sir Charles Sargent and Mr Justice Candy in *Motilal Kashibhai* v *Nana*[5] which took a course between the two extremes, and which admittedly lays down the law applicable in this Presidency to the present point The learned Chief Justice concedes for the purpose of argument that the word 'case' may be wide enough to include an interlocutory order, but he points out that a word of general import must be controlled by the purpose [illegible] which the section was framed That purpose [illegible] serves, was clearly to enable a party to obtain the [illegible] fication of a decision or order of a lower Court [illegible]

(1) (1883) 5 All 293
(2) (18[illegible]) [illegible]
(3) (1884) 6 All [illegible]33
(4) (1[illegible]) 14 Cal [illegible]
(5) (1892) 18 Bom. 35

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High Court when there would otherwise be no remedy. In the facts then before the Court a remedy was supplied by section 591 of the Code of 1882, and on that ground it was decided that the revisional jurisdiction of the Court could not successfully be invoked Mr Rao contends that this decision in *Motilal's case* (1) is in favour of the present petitioner, inasmuch as in the circumstances of this application the applicant has no other remedy available to him, and may, if this petition is summarily dismissed, be exposed to injustice, otherwise incapable of remedy It appears to me that this contention should prevail

I make no attempt to fasten any formal definition upon the word 'case' which occurs in section 115 I note only that, as was held in *Motilal Kashibhai v. Nana*(1), it is a word of wide or comprehensive import and clearly covers a far larger area than would be covered by such a word as "suit" or "appeal" There is, therefore, in my opinion, nothing incongruous or repugnant in holding that the word "case" may cover such an order as we have here, restraining a Hindu widow from adopting I am further of opinion that inasmuch as section 115 is merely an empowering section granting certain jurisdiction to the High Court, and as the use or exercise of that jurisdiction will within the prescribed limits, be regulated by the discretion of the High Court the section ought to receive rather a liberal than a narrow interpretation

Reverting now to Sir Charles Sargent's decision in *Motilal's case* (1) it is necessary to say that the present section 115 of our Code is a reproduction of section 622 of the Code of 1882 and that the old section 591 reappears without alteration in the present section 105 We must therefore in accordance with the Chief Justice's ruling

(1) (1892) 18 Bom. 35.

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enquire whether in this particular case a remedy against the order of injunction was supplied to the present petitioner by section 105 of the Code. To understand section 105 reference first must be made to section 104 which specifies the orders from which a first appeal is permitted, while section 105, as the marginal description shows, refers to "other orders". Under clause (i) of sub-section 1 of section 104 it is enacted that an appeal is allowed from any order made under rules from which an appeal is expressly allowed by rules. To ascertain which are the Orders here referred to we must turn to Order XLIII, Rule 1 which describes the orders from which an appeal lies. Clause (r) of this rule mentions an order under Rules 1 and 2 of Order XXXIX and these rules provide for the grant of a temporary injunction in such a case as that now before us. It follows therefore that the District Judge's order falls within the scope of section 104 of the Code and is, therefore, in my opinion, excluded from the scope of section 105. If that is so, then it clearly cannot be said that the petitioner had against this order a remedy supplied to him by section 105. Mr. Coyaji answers that there was, under section 104, a single appeal from the original order made by the Subordinate Judge: but that order was in the petitioner's favour and unless this application can now be considered the petitioner has no remedy against the order of which alone she complains. And it seems to me impossible to say that the injury caused by the order, if it is wrong, may not be irremediable, for, the petitioner or the boy chosen for adoption, may well die long before this ligitation reaches its end. That being so I think that, consistently with the ruling in *Motilal Kashibhai v. Nana*[1], we ought to hold that this application is competent under section 115.

[1] (1892) 18 Bom. 35.

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I think also that Mr Rao's alternative conte must be conceded that the application is in any within the extraordinary jurisdiction vested in Court That jurisdiction is derived from Re tion II of 1827 which empowered the Sadar Div Adalut to exercise general superintendence over all ordinate Courts By section 9 of the High Courts the jurisdiction thus originally granted to the S Diwanee Adalut was transferred to the High C when that Court was constituted in 1861 It is that the Regulation of 1827 was repealed in 187 Act XII of that year But the third paragraph of the section of the Repealing Act provides that "it shall affect any established jurisdiction, form or proce or existing usage, custom or privilege notwithstan that the same respectively may have been in manner affirmed, recognized or derived, by, in, or any enactment hereby repealed" It follows, I th *that the jurisdiction established in the Sadar Diw* Adalut in 1827 and in the High Court in 1861 was affected by the repeal of the Regulation in 1873

On these grounds I am of opinion that this Court jurisdiction to entertain the application which, th fore, should be considered on its merits

The only remaining question is, whether the inju tion, which the learned District Judge granted to plaintiff, can be allowed to stand I think not have had a learned and exhaustive argument, and the course of it it has been admitted at the Bar t there is no instance in the Reports where a Court restrained a Hindu widow from adopting to her decea husband I will not say that the Court has no ju diction to grant *such an injunction in any conceiv* circumstances, but I think I may safely say that in t circumstances now before us there is no justification

such an order The order is made in a suit which involves a claim to a very large estate, and it is extremely probable that the litigation may ultimately find its way to the Privy Council in which event it would be a sanguine estimate to suppose that the controversy will be terminated within the next three or four years Yet throughout that period this widow will be debarred from adopting, if the injunction is to be maintained During that period it is as I have said, possible that the widow may die It is possible also that the boy selected for adoption and, as we are told, approved by the Collector, may also die If things are thus left for the *indefinite period of the duration of this litigation*, it appears to me probable that the widow may never be able to exercise her inherent right of benefiting her deceased husband's soul by making this adoption to him In the meanwhile the estate which is in the hands of the Collector, is in no danger On the other hand, I cannot discern any real or grave inconvenience to which the plaintiff will be put by discharging the injunction The plaintiff either is or is not the legally recognized son of the Thakor If he is not he cannot suffer from the adoption If he is, he is equally saved from prejudice, because the adoption would in that event be void

I think that all considerations, not only of present convenience but of present justice, are so overwhelmingly in favour of the widow that we ought, in our extraordinary jurisdiction, to discharge the order of the learned Judge below In my judgment, therefore, the injunction should be dissolved, and the widow should have the costs of this application throughout

HAYWARD, J —I concur The question briefly is, whether an order granting a temporary injunction on

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first appeal is a "case decided in which no appeal lies" within the meaning of section 115 of the Civil Procedure Code

Now, it seems to me clear that such an order must be held to be a "case decided" in view of the very wide meaning ordinarily attachable to that word

Next such an order is an order passed under clause (i) of sub-section 1 of secton 104, and no appeal lies from such an order by virtue of sub-section 2 of section 104 But it must further be considered, whether such an order is one affecting the decision of the suit in which it was made and so an order which could be questioned on the final appeal from the decree under section 105

It appears to me it is not It stands by itself It is an order having force temporarily only pending the suit It cannot be said to be an order affecting the decision of the suit and could, therefore, not be called in question upon final appeal from the decree under section 105 For these reasons it seems to me that such an order must be held to be a "case decided in which no appeal lies" within the meaning of section 115 of the Civil Procedure Code

I also concur that the order would be open to consideration under the still wider provisions of section 5 of Regulation II of 1827, continued in force by virtue of section 9 of the High Courts Act of 1861 Those provisions have been saved from repeal by the operative sections of the General Repealing Act (XII of 1873) This has been indicated in the decisions holding that proceedings under the Mamlatdars Courts Act are subject to the supervision of this Court a jurisdiction which has been impliedly recognized in section 21 of the Mamlatdars Courts Act of 1906

It seems to me therefore on both these grounds that this application is open to consideration by this Court

Rule made absolute

R R

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BAI ATRANI v. DEEPSING BARIA THAKOR

CRIMINAL APPELLATE

Before Mr Justice Batchelor and Mr Justice Hayward

EMPEROR v JIVRAM DANKARJI *

1915 July 29

Criminal Procedure Code (Act V of 1898) section 403—Previous acquittal—Subsequent trial how far barred—Penal Code (Act XLV of 1860) sections 467 109 471

The accused was tried before a Court of Session for abetment of forgery in relation to a document under sections 467 and 109 of the Indian Penal Code and was acquitted. He was again tried before the Court of Session for using as genuine the same forged document under section 471 of the Indian Penal Code It was objected that the previous acquittal was a bar to the second trial under section 403 of the Criminal Procedure Code —

Held overruling the contention that sub section 1 of section 403 of the Criminal Procedure Code did not apply to the case inasmuch as the case was not one contemplated by section 236 that is to say a case where upon the facts proved it was doubtful what should be the true view of the offence constituted

Held further that the case fell under sub clause (2) of section 403 for the series of acts beginning with the forgery and ending with the user of the forged document in the Civil Court to support the civil claim must be regarded as so connected together as to form the same transaction or carrying through of a single predetermined plan so that under section 235 (1) it would have been competent to try the accused for both offences at the same trial

Held also that the case fell under sub section 4 of section 403 because the Court which acquitted the prisoner on the charge of abetment of forgery was not competent to try the offence under section 471 of the Indian Penal Code inasmuch as at the time of the earlier trial no sanction for the prosecution under section 471 had been given under section 195 of the Criminal Procedure Code

* Criminal Appeal No 226 of 1915

1915

EMPEROR v JIVRAM DANKARJI

APPEAL from conviction and sentence passed by C N Mehta, Additional Sessions Judge at Ahmedabad

On a complaint filed on the 25th April 1911, the accused was tried by the Additional Sessions Judge of Ahmedabad for abetting the forgery of two promissory notes, under sections 467 and 109 of the Indian Penal Code The trial ended in the acquittal of the accused on the 5th February 1912

In the meanwhile, on the 29th April 1911, the accused produced one of the promissory notes in a suit (No 187 of 1911) filed by him in the Court of the Subordinate Judge at Umreth The suit went against the accused The Subordinate Judge granted a sanction to prosecute the accused for having produced the forged promissory note

The accused was accordingly tried by the Additional Sessions Judge of Ahmedabad for using a forged promissory note as genuine knowing it to have been forged under section 471 of the Indian Penal Code

It was objected at the trial that the second trial was bad under the provisions of section 403 of the Criminal Procedure Code, on account of the acquittal in the first case The objection was, however, overruled, the accused was convicted of the offence charged, and sentenced to suffer simple imprisonment for six months

The accused appealed to the High Court

T R Desai for the appellant —I submit that the second trial is bad as having been contrary to the provisions of section 403 of the Criminal Procedure Code Civil Suit No 187 of 1911 was decided before the first trial began It was perfectly competent to the Sessions Court to charge the accused at that trial in the alternative under section 471 of the Indian Penal Code. The accused having been acquitted at that trial, could

not, on the same facts, be tried again for another offence disclosed by the same set of facts There was no new evidence at the second trial The case falls under clause 1 of section 403 of the Criminal Procedure Code as the offence under section 471 is cognate to that under section 467 of the Indian Penal Code The case falls under sub-section 2 of section 403 of the Criminal Procedure Code, for the offences under sections 467 and 471 of the Indian Penal Code though separable are not distinct offences under section 235, clause (1) of the Criminal Procedure Code see *Queen-Empress v Umrao Lal*[1] It is quite true that at the first trial, no sanction has yet issued against the accused for the offence punishable under section 471 of the Indian Penal Code, but the defect, if any could have been cured by the provisions of section 537 of the Criminal Procedure Code see *Perumalla Nayudu v Emperor*[2], see also *Queen-Empress v Eramreddi*[3] *King-Emperor v Krishna Ayyar*[4], *Kaptan* v *Smith*[5], and *Sharbe-Khan Gohain v Emperor*[6].

S S Patkar, Government Pleader, for the Crown —The provisions of section 403 of the Criminal Procedure Code are no bar to the second trial The case falls under sub section 4 of the section No conviction could be had for an offence under section 471 of the Indian Penal Code as there was no sanction granted The trial for an offence under section 471 in absence of sanction is bad in law See *In re Samsudin*[7]

BATCHELOR, J —This is an appeal from a conviction and sentence passed by the learned Additional Sessions Judge of Ahmedabad The appellant has been convicted under section 471 of the Indian Penal Code of using

(1) (1900) 23 All 84
(2) (1907) 31 Mad 80
(3) (1885) 8 Mad 296
(4) (1901) 24 Mad 641
(5) (1871) 16 W R 3 (Cr Rul)
(6) (1905) 10 C W N 518
(7) (1896) 22 Bom 711

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as genuine a forged document. He was previously tried before the Court of Session in Ahmedabad under *sections 467 and 109, that is to say*, on a charge of abetment of forgery in relation to the same document, Exhibit 4, in respect of which he is now charged under section 471, and on the charges under sections 467 and 109 the appellant was acquitted by the Court of Session.

The first point taken in the appellant's favour is that this previous acquittal was a bar to the present trial under section 403 of the Criminal Procedure Code. The contention is that the appellant's case falls under the first sub-section of section 403. That sub-section provides that a person once acquitted shall not be liable to be tried again on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237. Now, sections 236 and 237 contemplate the case where *it is doubtful, upon the facts which can be proved*, which of several offences will be constituted by those facts. In illustration (*a*) is put the case where a person is accused of an act which, upon the facts provable may amount to theft or to receiving stolen property, or to *criminal breach of trust or to cheating*. Section 237 merely carries on the procedure applicable to cases provided for by section 236. It appears to me that the facts of the present appeal are wholly outside the scope of section 236. For, upon the facts which were capable of proof at the earlier trial, it could never, at any moment, have formed the subject of doubt what the particular offence was which could be established against the prisoner. The only facts appearing in proof at that trial were facts which went to establish the abetment of forgery; that *offence and no other*, was the offence constituted by the facts then capable of proof. In the present prosecution, upon certain added

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facts, the evidence led goes to show that the prisoner committed the offence of dishonestly using a forged document, knowing that it was forged and there can be no doubt but that if this evidence is believed, that is the particular offence constituted by the facts which can now be proved We have not therefore, before us such a case as section 236 contemplates that is to say, a case where, upon the facts proved it was doubtful what should be the true view of the offence constituted It follows that the case is not governed by sub-section (1) of section 403

In my opinion the case falls under section 235, sub-section (1) of the Code and if that is so, then admittedly under sub section (2) of section 403 the accused's plea is unsustainable by virtue of the provisions of sub-section (2) of section 403 The series of acts beginning with forgery and ending with the user of the forged document in the Civil Court to support the civil claim must, I think, be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, so that under section 235 (1) it would have been competent to try the accused for both offences at the same trial And I have no doubt that these two offences would be distinct offences within the meaning of section 403 (2), and not merely separable offences, as that term is explained in section 35 of the Code

Moreover, it appears to me that the appellant's plea is bad for another reason, namely, because the case falls also under sub section 4 of section 403 For, the Court which acquitted the prisoner on the charge of the abetment of forgery was, in my opinion, not competent to try the present offence under section 471, inasmuch as at the time of the earlier trial no sanction for the prosecution under section 471 had been given under section 195 of the Code But section 195 (c)

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provides that in such a case as this, "no Court shall take cognizance" of any offence punishable under section 471 of the Indian Penal Code "except with the previous sanction" of the Court in which the document was produced, in other words as I understand it, the *grant of such a sanction is a condition precedent to the* Court's jurisdiction to try the offence under section 471, so that without that *sanction* the Court is *not* competent to undertake the prosecution This view is, I think, supported by the decision in *In re Samsudin*, [1] and though that ruling was delivered under the Code of 1882, the section of the old Code was worded in substantially the same terms as those employed in our present section 537 It was objected by Mr Desai that section 537, clause (*b*) shows that a prosecution though undertaken without the sanction *prescribed by section 195 cannot be said to have been* undertaken without jurisdiction That, however, in my view is not a legitimate inference from the section, which aims only at curing certain irregularities of procedure and to that end enacts that, 'subject to the provisions hereinbefore contained, no finding is to be reversed by reason of the want of any sanction required by section 195 The very utmost that *could* be made of this provision would be an argument relevant only *if the trial of the offence under section 471* had *proceeded* without a sanction and had resulted in a conviction It might then have been contended and contended against the appellant's interests that the conviction was valid notwithstanding the want of the sanction I say nothing of the merits of such an argument because in truth, we have nothing now to do with any consideration of this sort *It is enough to say that since there* has been no conviction under section 471 without a sanction those facts do not exist which alone can call

(1) (1896) 22 Bom 711

section 537 (b) into operation. For these reasons I hold that the present plea is excluded by sub-section (4) of section 403.

On the merits, there can, I think, be no question but that the learned Judge below is right and that the appellant had knowledge that this document was a forged document and used it dishonestly.

As to the question of sentence, it is true that the appellant is an old man and that he has been subjected to two criminal trials. At the same time his offence is in itself a serious one and he has had a specially light sentence awarded to him, no doubt on a due consideration of these circumstances in his favour which I have noticed.

I think, therefore, that the sentence cannot be reduced, but that the conviction and sentence should be confirmed.

HAYWARD, J.:—I concur as to the question of law. The first trial was for abetment of forgery and failed as the forgery was not proved to have been by the particular co-accused forger. The second trial was for *knowingly using the forged document in a civil Court.*

It seems to me that no doubt could have arisen in the first trial as to the offence constituted by the facts which could have been proved so as to have justified an alternative charge or conviction under section 236 or 237 of the Criminal Procedure Code. It was not a case like the illustration (*a*) to the former section where the facts provable might have established either theft or receiving stolen property and where the necessary additional facts were not present to render possible a determination definitely whether the offence of theft or of receiving stolen property had been committed. The facts provable in the first trial might have established

that the accused had abetted the forgery by the particular co accused forger But they could not have established any other offence It was not then alleged that he had used the forged document in the civil Court The facts were not the same in the two trials and recourse could not, therefore, in my opinion, be had to sub-section (1) of section 403 of the Criminal Procedure Code

It seems to me that the abetment of the forgery was one offence and the using of the forged document in a civil Court another and distinct offence committed in the same transaction, viz, the endeavour to recover by forgery the money claimed through the civil Court The matter, therefore, fell within the first sub-section of section 235 The accused was only charged with abetment of forgery at the first trial, though he might, no doubt, apart from the necessity of previous sanction, have been charged with both offences viz, the abetment of forgery and the using of the forged document in the civil Court He was therefore liable to be charged at the second trial with this using of the forged document in the civil Court under sub section 2 of section 403 of the Criminal Procedure Code

But it seems to me in any case that the Court at the first trial on the charge of abetment of forgery was not a Court of competent jurisdiction to try the subsequent charge of using the forged document in the civil Court For, no Court shall take cognizance of such an offence without the previous sanction of such civil Court under section 195 The second trial on the charge of using the forged document in the civil Court was, therefore, legal under the fourth sub-section of section 403 of the Criminal Procedure Code Nor could the Court at the first trial on the first charge be said, in my opinion, to have been a Court of competent jurisdiction to try the

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second charge of the second trial by reason of the fact that proceeding illegally with that charge would not necessarily have vitiated the trial by virtue of section 537 (b) of the Criminal Procedure Code Such proceeding would in my opinion, nevertheless, have been illegal even though the illegality might have been subsequently condoned under certain circumstances under section 537 (b) by a superior Court

I also concur on the question of fact viz accused's guilty knowledge and in the propriety of the sentence

Conviction and sentence confirmed

R R

CRIMINAL APPELLATE

Before Mr Justice Batchelor and Mr Justice Hayward

EMPEROR v BECHUR ANOP*

1915 August 10

Indian Penal Code (Act XLV of 1860) sections 100 325—Grievous hurt—Private defence—Plea cannot be set up in cases of deliberate fight

The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting as opposed to the cases where men are reluctantly forced to use violence in order to protect themselves from violence offered to them

APPEAL from convictions and sentences passed by P J Taleyarkhan, Sessions Judge of Broach

The deceased Jiji took away a log of wood belonging to accused No 2 and threw it into the Holi bon fire The accused No 2 was anxious to reclaim the wood from the fire, but was prevented from doing so by the deceased A quarrel took place between them, but they were separated and sent away to their houses The wood though charred was reclaimed from fire and taken to the house of accused No 2

* Criminal Appeal No 276 of 1915

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A party consisting of Jiji and four others then went to the house of accused No 2 to take back the piece of wood, but they were resisted by the three accused

A street fight ensued between them, in which persons on both sides were hurt The injuries received by Jiji were so serious that he died in a short time

The accused were thereupon tried by the Sessions Judge of Broach for an offence punishable under section 325 of the Indian Penal Code (Act XLV of 1860), in that they caused voluntary grievous hurt to Jiji without any grave and sudden provocation The accused raised a plea of self-defence, but the plea was disallowed, on the following grounds —

It was faintly suggested by the pleader for accused Nos 1 and 2 that they were acting in self defence The accused themselves however have not put forward any such plea though accused No 1 no doubt says that Jiji and his companions came over to where the charred piece of wood was lying and thereupon there was a fight while accused No 2 states that Jiji commenced the fight by striking his father It however appears from the evidence of prosecution witnesses as well as from that of the defence witnesses that the fight was preceded by a verbal altercation carried on for some length of time and as the fight took place in the street and as the combatants on both sides were armed with sticks *it is clear that men on both sides must have gone* into the street to fight Under the circumstances the plea of self defence cannot avail the accused

The accused were all convicted The accused Nos 1 and 2 were sentenced to suffer rigorous imprisonment for five years and accused No 3 to rigorous imprisonment for one year

The accused appealed to the High Court

G N Thakore, for the accused

S S Patkar, Government Pleader, for the Crown

BATCHELOR, J —This is an appeal from a judgment of the learned Sessions Judge of Broach who convicted

the three appellants of voluntarily causing grievous hurt otherwise than on grave and sudden provocation and under section 32[illegible] of the Indian Penal Code sentenced accused Nos 1 and 2 to five years rigorous imprisonment and accused No 3 to one year's rigorous imprisonment

1917 [illegible]

The only contention advanced by the learned pleader on behalf of the appellants was that the learned Judge below should have acquitted the appellants on the ground that they were entitled by their right of private defence to use the violence which in fact they did use The evidence however satisfies us that the fight which resulted in the death of one man and in injuries to one or two others, took place in the public street between the accused's party and the deceased's party and that both sides voluntarily engaged in it There is every reason to believe that both sides were more or less drunk on the occasion in question the quarrel having arisen about a log of wood which was thrown into the Holi fire, and the parties belonging to a caste in which it is usual to make the festival of Holi a pretext for intoxication and quarrelling Now where both sides voluntarily and deliberately engage in fighting as in the circumstances now before us it is not I think, open to a member of either party to claim the right of private defence In Russell upon Crimes (7th Edition, Vol I, p 810 Book IX, Chapter I) the law is stated in the following words —"The law is that if the blow, from the effect of which the deceased died, was given purely in self-defence as distinguished from a desire to fight, it is excusable and it is a question for the Jury whether the prisoner struck the blow in self defence, or whether he really desired to fight" see *Reg* v *Knock*[1] And in India we have a similar decision by the

[1] (1877) 14 Cox 1

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Calcutta High Court in *Kabiruddin* v *Emperor*,[1] where Mr Justice Rampini says —

I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case when both parties armed themselves for a fight to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle killing one man and wounding others In the present case the appellants if they had any right of private defence which in the circumstances in my opinion they had not did not act within the legal limits of such right They did not restrict themselves merely to the use of such force as was necessary to resist trespass On the contrary they far exceeded their right if they had any, for they killed a man and inflicted serious injuries on others

So here, even if it could be shown by the appellants, on whom the onus lies, that they were entitled to the *right of private defence—and in my opinion* it cannot be so shown—yet it is manifest that they exceeded that right by causing the death of the deceased man on whom no less than eleven injuries were found But, as I have said in my judgment this appeal fails, because the right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting as opposed to the case where men are reluctantly forced to use violence in order to protect *themselves from* violence offered to them.

The convictions, must, therefore, be confirmed But in view of all the circumstances disclosed on the record I think that the sentences passed upon accused Nos 1 and 2 may safely be reduced to sentences of two years rigorous imprisonment in the case of each

HAYWARD, J I concur

[illegible]

[illegible]

(1) [illegible]

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

1915
August 12

MINNIE WALLACE APPLICANT v SERGEANT MAJOR ARTHUR WALLACE OPPONENT *

Indian Divorce Act (IV of 1869) sections 3 16 37 and 44—Dissolution of marriage—Alimony—Jurisdiction—Nature of High Court's jurisdiction—Civil Procedure Code (Act V of 1908) section 24 (1) (a)—Transfer of proceedings

In a suit for dissolution of marriage under the Divorce Act (IV of 1869) a decree was passed in favour of the petitioner by the Divisional Judge Nagpur Division The said decree was confirmed by the High Court on the 20th November 1914 The successful petitioner thereupon having applied to the High Court praying that the opponent may be ordered to pay her proper sums by way of alimony

Held that the Court which was empowered to make the order either for alimony or for the maintenance and education of the children was the Court of the Divisional Judge and not the High Court

Held further that having regard to the nature of the personal jurisdiction which the High Court possessed over European British subjects under section 3 of the Divorce Act 1869 the Court of the Divisional Judge was not a Subordinate Court in the sense in which that expression was used in section 24 (*1*) (*a*) of the Civil Procedure Code so as to enable the High Court to transfer the proceedings of which notice had been served upon the respondent to the Divisional Court for disposal

CIVIL application against the decree passed by the Divisional Court, Nagpur Division

The petitioner Minnie Wallace filed suit No 1 of 1913 in the Court of the Divisional Judge, Nagpur Division, against her husband praying for divorce under Act IV of 1869 On the 7th March 1914 the Divisional Judge, Nagpur, passed in the said suit a decree for dissolution of the marriage subject to the confirmation of the High Court On the 20th November 1914 the said decree of

* Civil Application No 305 of 1915

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education of the children is in this case the Court of the Divisional Judge and not the High Court, and we do not think that having regard to the nature of the jurisdiction we can hold that the Court of the Divisional Judge is a subordinate Court in the sense in which that expression is used in section 24 (1) (*a*) of the Civil Procedure Code so as to enable us to transfer this proceeding, of which notice has been served upon the respondent, to the Divisional Court for disposal It is an unfortunate case, but we must be particular in the exercise of the very special jurisdiction given to us under the Indian Divorce Act, and the only course now open to us is to return the petition for presentation to the proper Court

Application returned

J G R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

1915
August 10

RANGAPPA BIN NINGAPPA IMMADI AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS *v* VENKANBHAT BIN LINGANBHAT JOSHI AND ANOTHER (ORIGINAL PLAINTIFFS) RESPONDENTS *

Valandar Joshi—Right to officiate at marriages—Yajman—Ceremony in Pancha Kalas Lingayet form—Claim for fees in respect of part of the ceremonial in Hindu form—Ceremony cannot be split up

The question raised in this appeal was whether the ceremonials observed by Lingayets in marriages are to be regarded as a whole in deciding whether or not the village Gramopadhya is entitled to perform the ceremony or whether the ceremony can be split up into parts and if it is found that some part of the ceremonial is similar to the Brahmin ritual the Gramopadhya can insist upon payment of fees in respect of such part of the ceremonial as may have been performed by another

Held that if the ceremony performed was not a Hindu marriage ceremony as a whole the Joshi or Gramopadhya had no right to demand the fees.

* Second Appeal No. 216 of 1914

1915

RANGAPPA
v.
VENKAN
BHAT

SECOND appeal against the decision of E H Leggatt, District Judge Dharwar, reversing the decree passed by V V Wagh Subordinate Judge at Dharwar

Plaintiffs as the hereditary Watandar Joshis of Annigeri and eight other villages sued to recover rupees 5 annas 10 the amount of the fees, payable at two marriages celebrated in defendant 1's house and to obtain an injunction restraining the defendants from inviting persons other than the plaintiffs to officiate at marriages and from paying to such persons the fees due to the plaintiffs They alleged that it was their right to (a) write *Nandi*, (b) throw rice, (c) tie the Kankan, (d) fasten the Mangalsutra and otherwise officiate at the marriages that took place among the Kurba caste to which defendant No 1 belonged

Defendant No 1 answered that the marriages in his house were not performed by writing *Nandi* as stated by plaintiffs, that they were performed by installing *Pancha-kalas*, that his caste people were amenable to the jurisdiction of the Lingayet religion and not to that of the plaintiffs' caste that the defendant's family had never had their marriages performed by the plaintiffs, and that they were not entitled to receive fees

The Subordinate Judge rejected the plaintiffs' claim holding that the marriages were not performed according to Hindu ritual as observed by the Joshi but in *Pancha kalas* Lingayat form He observed that in determining the liability the ceremony must be taken as a whole in particular form and it would not be right from the common circumstance of fastening of Mangalsutra or the wrist thread or the throwing of rice on the bridal pair, to say that the ceremony was in Hindu form and that the Watandar Joshi was entitled to his fees.

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RANGAPPA v. VENKAN BHAT

The District Judge, on appeal, reversed the decision holding that the plaintiffs were entitled to perform the ceremonies of (*a*) throwing rice, (*b*) tying Kankandhara, (*c*) tying Mangalsutra and that for the last two acts they were entitled to fees

The defendants appealed to the High Court from this decision

Nilkant Atmaram for the appellants —The Lingayets are not Brahminical Hindus and therefore they are not bound to employ Brahmin priest for their marriage ceremonies In this particular case the District Judge found that all the ceremonies of the Brahmanic marriage ritual were not performed The ceremonies at marriages must be treated as a whole and cannot be split up *Waman Jagannath Joshi* v *Balaji Kusaji Patil* [1]

S V Palekar for the respondents —We contend that it would be wrong to say that Lingayets are non Hindus and that their obligation to choose their priests, for marriage purposes from among the Vatandar Joshis of the village to which they belong, is no greater than that of convert Christians or Mahomedans The Lingayets are Hindus and as a matter of fact, they call themselves Veershaivas see *Bombay Gazetteer*, Vol XXII, p 102 Once it is conceded that they are Hindus the ruling in *Raja Valad Shivapa* v *Krishnabhat* [2] applies Therefore, when the defendant asserts that the plaintiffs, who are admittedly the Vatandar Joshis of the Hallikeri village to which the defendants belong are not entitled to officiate at the marriage ceremonies of all the Hindus in that village and receive the fees the burden lies upon him of proving the statement He has done nothing to discharge that burden

[1] (1889) 14 Bom. 167 [2] (1879) 3 Bom. 232

On the contrary, the plaintiffs have affirmatively proved that they are entitled to officiate at the houses of all the members of the community to which the defendant belongs

Defendant has no doubt engaged another priest to perform the marriage ceremony Even then he is liable to pay to the plaintiffs the fees which would be properly payable to them if they, the plaintiffs, had been employed to perform the ceremony *Dinanath Abaji v Sadashiv Hari Madhave*[1] The lower appellate Court, whose finding of fact is binding in second appeal, has found that only three of the component ceremonies were, as a matter of fact performed Even in that case the plaintiffs are entitled to their fees due in respect of those particular component ceremonies This is the real principle underlying the case of *Waman Jagannath Joshi v Balaji Kusaji Patil*[2]

SCOTT, C J —The contest in this case resolves itself into this whether the ceremonials observed by Lingayets in marriages are to be regarded as a whole in deciding whether or not the village Gramopadhya is entitled to perform the ceremony, or whether the ceremony can be split up into parts, and if it is found that some part of the ceremonial is similar to that according to the Brahmin ritual the Gramopadhya can insist upon payment of fees in respect of such part of the ceremonial as may have been performed by another The point is stated exceedingly well by the learned Subordinate Judge Mr Wagh He says —

It is urged that some of the ceremonials such as the fastening of the Mangalsutra and the Kankandhara are common to the Hindu form and the Pancha Kalas form and that therefore the fastening of the Mangalsutra and the Kankandhara in the Pancha Kalas form of marriage entitles the plaintiffs to the fee appropriate to the Hindu form If the ceremonials of the Brahmins

(1) (1878) 3 Bom 9 (2) (1889) 14 Bom 167 at p 170.

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RANGAPPA v. VENKAN BHAT

the Jains and the Lingayets are compared it would be found that they agree in some points and are divergent in others Yet they have their characteristic basic differences arising out of the faith on which they are founded It would not be right therefore from the common circumstance of the fastening of the Mangalsutra or of the wrist thread or the throwing of rice on the bridal pair to say that the ceremony is Hindu in form and that the Watandar Joshi is entitled to his fee We have to take the marriage ceremony as a whole and determine whether it is in the Hindu form or in the Pancha Kalas Lingayet form If it is the former the Joshi is entitled to his fees and if it is the latter he is not

The contrary view is stated by the District Judge who after consideration of the cases cited to him, namely, *Raja valad Shivapa* v *Krishnabhat* [1], *Waman Jagannath Joshi* v *Balaji Kusaji Patil* [2], and *Krishnumbhut* v *Anunt Gungadhurbhut* [3], says —

I am therefore of opinion that the Court must consider the particular ceremonies performed rather than the marriage as a whole and that even if some ceremonies whether optional or obligatory were performed which plaintiff himself could not perform and for which he can therefore claim no fees the fact does not debar him from claiming fees on account of other ceremonies which were actually performed and which plaintiff could perform and is entitled to perform in the ordinary course in the case of marriages in the caste of defendant No 1 The addition of some ceremonies which plaintiff could not perform and the omission of others which would necessarily have been performed had plaintiff officiated does not affect his right to recover his proper fees if any on account of such ceremonies as were performed

We are of opinion that the view taken by the District Judge is based upon a misapprehension of what was decided by this Court in *Waman Jagannath Joshi* v *Balaji Kusaji Patil* [2] The judgment of the Subordinate Judge with appellate powers reversing that of the Subordinate Judge was there under appeal to the High Court The appellate Court's opinion was that "the plaintiffs were only entitled to recover in case a marriage was performed in any of the modes known to

[1] (1878) 3 Bom 232 [2] (1889) 14 Bom 167
[3] (1857) 4 Morris 111

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VENKAN
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the Hindu law, or in the mode described by Mr Mandlik with respect to castes other than the Brahmin caste and that the marriages in dispute being not performed in any such way they were not such marriages as they were entitled to recover fees for in virtue of any right acquired by grant or prescription The High Court said "We agree with the lower appellate Court that under such circumstances as he thinks existed here there would have been no intrusion on the plaintiffs privileges which would give them a right to recover their fees from the Yajman as laid down in the decisions of this Presidency But no issue was expressly raised as to the manner in which the marriages in question were performed and although in the course of the hearing some evidence was given on the subject, neither party we think, clearly understood what was the real issue between them on that part of the case" Therefore the issue was sent down to the District Court "What ceremonies were performed on the occasions of the marriages, or either of them, and by whom?" We have referred to the record in that case and we find that the learned District Judge after stating what ceremonies were, on the evidence taken on remand, performed, stated his opinion that 'the ceremonial enumerated by the late V N Mandlik in his Hindu law as observed by lower castes was not followed on these occasions That was a confirmation of the inference drawn by the lower appellate Court whose judgment was under appeal to the High Court and upon that finding the Court confirmed the decree of the First Class Subordinate Judge, with appellate powers, with costs We take that as an authority for the opinion of the Subordinate Judge that if the ceremony performed is not a Hindu marriage ceremony as a whole the Joshi or Gramopadhya has no right to demand the fees

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RANGAPPA v. VENKAN BHAT

We reverse the decision of the lower appellate Court and restore that of the Subordinate Judge with costs throughout upon the plaintiffs The cross objections are dismissed with costs

Decree reversed

J G R

APPELLATE CIVIL

— —

1915

August 17

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

RAMCHANDRA DINKAR PRABHU MIRASI AND OTHERS (HEIRS OF ORIGINAL DEFENDANTS NOS 10—12) APPELLANTS v KRISHNAJI SAKHA RAM PRABHU MIRASI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS 1 TO 9 13 TO 25 AND 29) RESPONDENTS *

Decree—Execution of decree—Partition effected by Collector—Partition not in accordance with the direction of the decree—Wrongful distribution of shares—Mistake—Collector s power to re open partition—Court s duty to rectify mistake of its agent

One Atmaram Bhagwant a member of a Mirasi family brought a suit for partition of his 1/36th share in three villages In November 1888 a decree was passed directing that the half share of the Desai family in each of the three villages should first be separated and the remaining share divided between the members of the Mirasi family in accordance with the decree Atmaram applied for execution of the decree in Darkhast No 127 of 1893 but before partition was made on this application defendant No 8 filed Darkhast No 404 of 1894 for his share These Darkhasts were disposed of in 1898 when defendant No 8 s share was separated and given into his possession The appellants (defendants Nos 10—12) then applied for separate possession of their share in 1900 but when the surveyor prepared a list of lands remaining over after the first partition as the share of the appellants the latter found that the Khasgi land in one of the villages remaining for their share was less than what they were entitled to and that the plots below and adjoining their houses had been allotted to the share of defendant No 8 They then applied to the Collector to re open partition The Collector declined to do this and referred the matter to the Court on the ground that the appellants refused to take possession of their shares The appellants

* Second Appeal No 590 of 1912

therefore applied to the Court for fresh partition and determination of their legitimate share The lower Court dismissed their application as being barred by *res judicata* On appeal to the High Court

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RAMCHANDRA DINKAR v KRISHNAJI SAKHARAM

Held granting the application that the Court would not allow a mistake of one of its agents in carrying out its directions to work permanent injustice

SECOND appeal against the decision of V G Kadushkar, First Class Subordinate Judge A P at Ratnagiri, confirming the decree passed by V N Navaratna, Subordinate Judge of Devgad

Execution proceedings

One Atmaram Bhagwant a member of a Mirasi family brought a suit for partition of his 1/36th share in the three villages named Kuvale, Bharni and Chafet These villages were owned by the families of Desai and Mirasi each owning one half share in each of the three villages In November 1888 a decree was passed for partition, the main provisions of which were (1) that the plaintiff should take into possession his 1/36th share, on a division by metes and bounds of the whole property in dispute except the Kulkarni Watan but the plaintiff, before taking possession of his share, should pay with their consent to certain of his Mirasi co sharers certain specified sums of money (2) that equal divisions between Desais and Mirasis should be made in each village, (3) that from the 8 annas separated share of the Mirasis the shares of the sub sharers should be ascertained the respective fractions being specified in the decree, (4) that after they had paid the proper Court fee in respect of their shares, their shares were to be separate and as regards the lands which were with the sharers the same were as far as possible to be kept with them at the time of partition subject to certain provisions to secure equality The plaintiff then applied (Darkhast No 127 of 1893) for the execution of the said decree Before the partition was made on his application, the

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RAMCHANDRA DINKAR v KRISHNAJI SAKHARAM

other five sharers also applied, except the appellants (defendants Nos 10—12) for the separation of their respective shares Notices were issued to all the parties including the appellants and half the share of the Desai family was first separated as directed by the decree and then the shares of the above six sharers were determined and separate possession was given to all the sharers except the Desai family and the appellants The six Darkhasts were accordingly disposed of in 1898 The appellants then applied in 1900 (Darkhast No 727 of 1900) for the separate possession of their share The usual warrant was sent to the Collector who referred it to the surveyor When the surveyor prepared a list of lands that remained after the first partition as the share of the appellants, the latter found that the Khasgi lands in Kuvale were far less than what they were legally entitled to and that the plots below and adjoining their houses had been allotted to the share of defendant No 8 They then applied to the Collector to re-open the partition The Collector declined but proposed that the surveyor should at the appellants' expense see if they could be compensated out of the Desai's lands The appellants having failed to pay the expenses, the Collector reported to the Court that the appellants refused to take possession of their shares The appellants, thereupon, filed the application on the 24th October 1907 attacking the previous partition as fraudulent and requesting that the partition might be reopened to determine their legitimate share

The defendant No 8 alone opposed the application He contended that the partition was made with the consent of all the parties including the appellants and as it was sanctioned by the Court, it could not be re-opened that the application was out of time and barred by *res judicata*, that the appellants were estopped from disputing the previous partition

The Subordinate Judge held that the application for revision of the partition was not maintainable and that it was barred by *res judicata*.

The decree was confirmed in appeal.

The appellants then preferred a second appeal.

A. G. Desai for the appellants:—The decree for partition was passed in 1889 and the appellants applied in execution for partition and separate possession in 1900. It is true that the other Darkhasts by other sharers have been finally disposed of in 1898. But the District Judge reports that no final decree has yet been drawn up. Until therefore, our Darkhast which is the last of its kind is disposed of, the Court continues to have jurisdiction to re-adjust shares or to correct evidently wrong allotment under any previous Darkhasts. There can be no question of *res judicata* in such a case as this. The Collector has to carry out the terms of the decree. The allotment by the Collector clearly contravenes the decretal commands. That being so the Court will not allow a substantial wrong done to the appellants to remain unredressed. The party benefited by such inequitable allotment cannot take shelter under any technical defence and claim to retain the property wrongly allotted to him.

[SCOTT C. J.:—Do you rely on the principle laid down in section 316 of the Indian Succession Act?]

The principle of refunding would appropriately apply. The illustration to section 321 of the Act illustrates our case. See also Daniell's Chancery Practice, pp. 910-11; Story on Equity Jurisprudence, Chapter XIV, p. 434, para. 656 (*b*); *Fisher* v. *Robinson*[1]; *Baylis* v. *Smith*[2].

K. N. Koyajee for the respondent No. 10:—The previous Darkhasts having been disposed of and the

(1) (1892) 9 T. L. R. 135. (2) [1909] 2 K. B. 112.

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Ramchandra Dinkar v. Krishnaji Sakharam

manner of division having been settled by the divisions in these Darkhasts, the present question is barred by *res judicata*. Cited, Seton Vol I, p 125, Vol II, p 1593, Daniell's Chancery Practice, Vol I, p 709 (8th edn)

Scott, C J —The partition suit in which the execution proceedings (Darkhast 727 of 1900) now in question are taken was brought by the plaintiff, a member of a Mirasi family, interested to the extent of 8 annas in certain 3 villages named Kuvali, Bharni and Chafet. The other 8 annas in each village belonged to a Desai family. The plaintiff claimed a 1/36th share.

In November 1888 a decree was passed for partition, the main provisions of which were (1) that the plaintiff should take into his possession his 1/36th share, division by metes and bounds being effected of the whole property in dispute except the Kulkarni Watan, but the plaintiff before taking possession of his share was to pay with their consent to certain of his Mirasi co-sharers including the present appellants certain specified sums of money.

(2) Two equal divisions between Desais and Mirasis were to be made in each village.

(3) Then from the 8 annas separated share of the Mirasis the shares of the sub-sharers should be separated, the respective fractions being specified in the decree.

(4) After they had paid the proper Court fee in respect of their shares their shares were to be separate, and as regards the lands which were with the sharers the same were as far as possible to be kept with them at the time of partition subject to certain provisions to secure equality.

The plaintiff first filed his application for execution of the decree in Darkhast 127 of 1893 and the main

inquiry in connection with the partition was held under the Collector's direction in that Darkhast proceeding Thereafter the defendant No 8 filed Darkhast 404 of 1894 for his share and the Collector's surveyor who had been employed by the Collector on this Darkhast proceeding No 127 stated in his report in Darkhast 404 that no thikan having in it the houses of any other party had been allotted to defendant No 8's share That Darkhast was disposed of in or about 1898 according to the statement of the appellant but the date cannot be verified as many papers are missing and the only note of the Subordinate Judge which we have relating to any Darkhast other than that of the appellants relates to Darkhast 118 of 1896 of defendant No 2 and notes that the warrant for Kuvalegai having been executed and the Darkhastdar raising no objections this Darkhast is disposed of The appellants state that they applied for separate possession of their share in 1900 but when the surveyor prepared a list of lands remaining over after the first partition as the share of the applicants the latter found the Khasgi lands in Kuvale remaining for their share far less than they should have got and that the plots below and adjoining their houses had been allotted to the share of other sharers They then applied to the Collector to re open the partition The Collector declined to do this but proposed that the surveyor should at the applicants' expense see if they could be compensated out of the Desai's lands The applicants say they wanted time to pay these expenses and the Collector then reported to the Court that the applicants refused to take possession of their share

It is stated by the Subordinate Judge in the proceedings in confirmation of the applicants complaint, that the Collector's surveyor has noted that the applicant's house in Survey No 76, Tikam No 8 of

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RAMCHANDRA DINKAR v KRISHNAJI SAKHARAM

Chafet village was allotted to defendant No 8's share, while the same defendant got about double his share in the Khasgi lands and for the applicants only about half their proper share remains

The lower Courts while recognizing the injustice to the applicants in the partition which has been effected felt unable to interfere The lower appellate Court thought that the share prepared for defendant No 8 had been and "must have been embodied in the final partition decree and it would operate as *res judicata* even as among the defendants the suit being for partition" There is no trace in the proceedings of any final decree and on inquiry the District Judge has informed us that it was not the practice to make partition decrees final and reports that the last order in the proceedings is one dated the 1st of July 1897 directing the papers sent by the Collector, after effecting compliance with the Court warrant and delivering possession to be filed

It is evident from the findings of the lower Courts that the Collector's partition has not been made in accordance with the directions of the decree The Collector acts ministerially in executing the Court's decree see *Dev Gopal Savant v Vasudev Vithal Savant*[1] and an injustice has been done by awarding to defendant No 8 the appellants' house as well as too much land The appellants were according to the decree to get their shares on paying the proper Court fee No time was specified within which such payment should be made The suit was not the defendants suit and they should be allowed to pay at their convenience That they paid and applied for their shares later than the others is no reason for non-compliance by the Court's agent with the terms of the decree The lower Courts evidently suspected fraud on the part of

[1] (1887) 12 Bom 371 at p 376

1915

RAMCHANDRA DINKAR
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defendant No 8 and possibly the Collector's surveyor in the earlier proceedings We will not, however, assume it It is sufficient to say that this Court cannot allow a mistake of one of its agents in carrying out its directions to work permanent injustice

The applicants must have their right share so far as they can get it at the expense of defendant No 8

The case resembles that of a legatee over-paid by an executor by order of the Court Such legatee must refund to allow of equal distribution of the estate This principle has long been recognised It is to be found stated in Vernon's Reports(1690) and is applied in section 135 of the Probate and Administration Act 1881

We set aside the order of the lower Court, and direct that the papers be returned to the Collector to adjust the shares of the defendant No 8 and the appellants as far as possible according to the provisions of the decree

The defendant No 8 must pay the appellants' costs throughout

Decree reversed

J G R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

1915
August 20

RAMKRISHNA TRIMBAK NADKARNI AND OTHERS (ORIGINAL DEFENDANTS NOS 12 TO 14) APPELLANTS v. NARAYAN AND OTHERS SONS AND HEIRS OF THE DECEASED SHIV RAO NARAYAN ARAS (HEIRS OF ORIGINAL DEFENDANT NO 1) RESPONDENTS*

Hindu Law—Debt—Son's liability to pay father's debts—Debts contracted in trade carried on against Government Servants Conduct Rules 1904

Sons cannot escape liability for payment of the debts of their father contracted in a trade carried on by him in contravention of Government Servants Conduct Rules on the ground that the conduct of their father in contracting debts in such trade was *avyavahar*

SECOND appeal against the decision of C V Vernon, District Judge, Karwar, modifying the decree passed by P Sriniwas Rao, Additional Subordinate Judge, Karwar

The facts of the case were briefly as follows —

One Trimbak Annappa, (defendant No 5), father of the appellants (defendants Nos 12—14) while serving as a postmaster of Ankola wanted to carry on a fish trade and thereby earn something in addition to his salary as a postmaster He being a Government servant could not openly carry on trade without infringing the Government Servants' *Conduct Rules, 1904* He, therefore, secured the assistance of defendant No 1 who agreed to supply money for the trade The fish trade continued for about 8—9 years when it was stopped owing to heavy losses The defendant No 1 then represented to Trimbak that the losses sustained in trade amounted to about Rs 6,000 and persuaded him to execute a mortgage bond in his favour on the 24th April 1900 for Rs 3,000 as security for his being reimbursed

* Second Appeal No 278 of 1914

is (Trimbak's) share of the c ... ed
laintiff took from defendant No 1 ...
he said mortgage bond on 15th A...
rought a suit to recover Rs 3,317-8-0 ...
ue thereon by sale of the mortgaged pr...

The defendants Nos 12—14 who had ...
roperty mortgaged by their father def...
lefendant No 1 pleaded that they were ...
heir father's debts that they did not ...
fides of the mortgage bond of their father ...
assed for debts incurred for immoral ...
purposes that their father was given to ...
and was fond of gambling in speculative ...
that they were not liable under the Hindu L...
off debts so imprudently incurred by their f...

The Subordinate Judge framed the f... other issues —

(1) Whether defendant No 3 co... debt for illegal or immoral purpose ... fendants Nos 12—14?

(2) Is the mortgage transaction of ... with defendant No 1 null and void by ... having been entered into in violation ... ment Servants Conduct Rules as pre... ment?

He found on these issues that the ... transaction of Trimbak, defendant No ... ant No 1 was not null and void under ... Indian Contract Act, the defendants ... not bound to pay the debts as they were ... father in the course of an ill concerned ... imprudently and in a most unbus... He therefore, passed a decree directing ... be realized by sale of the father's (d... interest alone in the mortgaged prop...

1915

RAMKRISHNA TRIMBAK v. NARAYAN

The District Judge, on appeal by the plaintiff, modified the decree so as to make the interests of defendants Nos 12—14 in the mortgaged properties liable as well as the interest of defendant No 5

The defendants Nos 12—14 appealed to the High Court

G S Rao and *Y N Nadkarni* for the appellants — We contend that the mortgage by defendant No 5 was not binding on defendants Nos 12—14, because the debt was either illegal or improper and conferred no benefit upon the estate

Defendant No 5 was a postmaster at Ankola and the Government Servants Conduct Rules prohibited any trading on his part But in contravention of these rules he traded for eight or nine years and incurred debts and had to pass mortgage bond dated 24th April 1900 That being so this is one of those debts which the sons are not bound to pay as being improper or *avyavaharik* see *Durbar Khachar* v *Khachar Harsur*[1]

Any debt incurred by a Government servant in any manner prohibited by rules is improper And where the text admits of such a wide interpretation of the term '*avyavaharik*' then the Courts will exempt the sons from the liability

'*Avyavaharik*' means improper or unbecoming See West and Buhler, Appendix p 1239, Colebrook Digest, Vol I, p 210, where '*avyavahar*' is translated as 'a purpose repugnant to good morals' Mandlik's Translation of Vyavahar Mayukh at p 113

Those debts only which are excusably incurred are binding upon the sons The debts which are excusably incurred are those incurred for the use of the family or for a necessary purpose See Mitakshara, Chapter 1,

[1] (1908) 32 Bom 348

sec 1, pl 27—29 also Stoke's Translation at pp 376 and 393

Nilkant Atmaram for the respondents —The case of the appellants in the lower Courts was that the mortgage was void because it was opposed to public policy and secondly that the sons were not liable, because the trade was carried on in an unbusinesslike manner

The point made here is that the sons are not liable, because the trade in respect of which the debts were incurred was carried on by their father in contravention of the Government Servants Conduct Rules

Whatever may be the character of the debt, since defendant No 1 has paid it at the request of defendant No 5, he ought not to be affected

The debt being an antecedent debt, father and the sons are bound to pay Government Servants' Conduct Rule 14 relied upon by the other side cannot be given the strict interpretation which it would otherwise have, had it been a statute It is a rule of conduct, the breach of which is not an offence

'*Avyavaharik*' means that which is repugnant to good morals or opposed to law and custom There must be something inherently bad in the act itself and not anything accidental The case of *Durbi Khachar* v *Khachar Harsur*[1] has been construed in *Chhakauri Mahton* v *Ganga Prasad*[2] and *Venugopala Naidu* v *Ramanadhan Chetty*[3] and there the distinction drawn is that when the act done by the father amounts to a criminal offence then the sons are not liable to pay

In the present case there may be mere breach of duty, but that did not amount to a criminal offence and hence the debt cannot be said to be improper

(1) (1908) 32 Bom 348 (2) (1911) 39 Cal 862 at p 871
(3) (1912) 37 Mad 458

1915

RAMKRISHNA TRIMBAK v NARAYAN

The case of *Durbar Khachar* v *Khachar Harsur*[1] goes too far The observations made therein ought to be restricted to the particular point decided in that case Under that Ruling sons of a person who unsuccessfully defends a suit cannot be held liable

Rao in reply

SCOTT, C J —The plaintiff sues to enforce a mortgage effected in his favour by the 1st defendant The mortgage security consisted of a piece of land, the property of the 1st defendant, and of land which was the property of the family of the 5th defendant and his sons, the present appellants, which was ostensibly burdened with a mortgage debt created by the 5th defendant in respect of certain payments made or liabilities incurred by the 1st defendant at the 5th defendant's request in respect of dealings in a trade in fish instituted by the 5th defendant and carried on largely under the management of the 1st defendant

The present appellants pleaded that they were not liable for their father's debt, that they did not admit the *bona fides* of the mortgage bonds of their father, that they were passed for debts incurred for immoral and illegal purposes that their father was given to profligate habits, and was fond of gambling in speculative transactions recklessly, that they derived no benefit from the transactions, and that they were not liable under the Hindu Law to pay off debts incurred by their father so imprudently

When the case came to trial issues were raised upon the pleadings The 2nd issue was whether defendant No 5 contracted the above debt for illegal or immoral purposes as alleged by defendants Nos 12 to 14 But during the hearing a further issue was raised in these terms —Is the mortgage transaction of defendant No 5

[1] (1908) 32 Bom. 348

with defendant No 1 null and void by reason of its having been entered into in violation of the Government Servants Conduct Rules as prescribed by Government? The point then made was that having been entered into in contravention of Government Servants Conduct Rules, the transactions which resulted in the mortgage debt were null and void under section 23 of the Indian Contract Act as being agreements forbidden by law or opposed to public policy The learned Judge held that the transactions were not void under section 23, but he decided the 2nd issue in favour of the present appellants It was suggested to him that the whole scheme of business was *avyavahar*, and therefore, such as could not give rise to a liability in the sons to pay their fathers debts and upon the authority of *Durbar Khachar v Khachar Harsur* (1) he decided that the debts in suit came under that class of debts which it is not the bounden duty of the sons to pay as being illegal in the sense in which the Hindu Law texts so consider them Accordingly a decree was passed for the amount claimed, and on default for sale of the father s interest alone in the family properties, and for sale of the property belonging to the 1st defendant

The 1st defendant who was made personally liable under the decree for any deficiency that might arise on the sale appealed to the District Judge, and again the same arguments were put forward on behalf of the present appellants The Government Servants' Conduct Rules were only made use of for the purpose of contending that the contract was void as being contrary to public policy under section 23 The learned Judge held that defendants Nos 12 to 14, the present appellants, failed to prove that their father's conduct was *avyavahar*, and accordingly modified the decree so as to make

(1) (1908) 32 Bom 348

1915

RAMKRISHNA TRIMBAK v. NARAYAN

the interest of defendants Nos 12 to 14 in the mortgaged property liable as well as the interest of defendant No 5

From that decree defendants Nos 12 to 14 have appealed, joining as respondent only defendant No 1, although they seek to reduce the mortgage security available for payment of the plaintiff's debt according to the decree of the District Court It is clear, we think, that they cannot get a decree in the absence of the plaintiff But it is desirable that we should express our opinion upon the points which have been thoroughly argued by the pleaders on both sides Section 23 of the Indian Contract Act is no longer appealed to The contention that the transactions were void as being contrary to public policy is abandoned, but the Government Servants' Conduct Rules are now used in aid of the argument that fathers' conduct was *avyavahar* The only authority which can be relied upon in support of that contention is the case of *Durbar Khachar* v *Khachar Harsur*[1] That case has not met with acceptance in any of the other High Courts in India, see *Chhakauri Mahton* v *Ganga Prasad*[2] *Venugopala Naidu* v *Ramanadhan Chetty*[3] and *Sumer Singh* v *Liladhar*[4] But assuming for the purpose of argument that it was correctly decided, it only decides this, that a civil penalty imposed by way of damages upon the father for a civil wrong committed by him does not give rise to any moral obligation on the son to discharge that liability

Now the Government Servants' Conduct Rule which is referred to in this case is as follows —

A Government servant may not without the previous sanction of the Local Government engage in any trade or undertake any employment other than his public duties

(1) (1908) 32 Bom. 348
(2) (1911) 39 Cal 862
(3) (1912) 37 Mad 458
(4) (1911) 33 All 472

A Government servant may undertake occasional work of a literary or artistic character provided that his public duties do not suffer thereby but the Government may in its discretion at any time forbid him to undertake or require him to abandon any employment which in its opinion is undesirable

That is a rule which is not based upon any statutory prohibition, but is, as it is expressed to be, merely a rule of conduct The 5th defendant who is alleged to have violated that rule was a postmaster at Ankola on a small salary, and in order to supplement his income he engaged in a fish trade a very common occupation on the West coast of India The work in connection with the trade, as appears from the evidence was done almost entirely by the 1st defendant

The question then is whether applying the test laid down in *Durbar Khachar v. Khachar Harsur* [1] as the highest point at which the appellants case can be put, such conduct on the part of the 5th defendant could be treated as conduct which the father "as a decent and respectable man" ought not to have engaged in, and whether the debts of the fish trade were debts "attributable to his failings, follies or caprices" We have no doubt that such debts cannot be said to be attributable either to his failings, follies or caprices, nor do we think that it can be said that his conduct in embarking in such fish trade is conduct of which no decent and respectable man would be guilty As was put by Mr Nilkant on behalf of the 1st defendant, if the restriction or the prohibition against embarking in trade occurred in a contract with a large employer of labour other than Government in which the clause was that the servant might not engage in a trade, it cannot be contended that a disregard of such an injunction would taint his trade dealings with immorality or impropriety as between himself and those with whom he traded We, therefore, affirm the decree and dismiss the appeal with costs

Decree confirmed

J G R

(1) (1908) 32 Bom 348

ORIGINAL CIVIL

Before Sir Basil Scott Kt, Chief Justice and Mr Justice Davar

1915
February 18

IN THE MATTER OF THE INDIAN COMPANIES ACT VI OF 1882 AND IN THE MATTER OF THE INDIAN SPECIE BANK LTD (IN LIQUIDATION)

SORABJI NUSSERWANJI POCHKHANAWALLA (APPLICANT APPELLANT) v C A PATWARDHAN THE CHIEF OF SANGLI AND OTHERS (RESPONDENTS) *

The Indian Companies Act (VI of 1882) sections 58 147—Liquidation—List of contributories—Rectification of register of shareholders—Transfers signed by transferor and transferee and lodged before winding up of the Company—Practice of the Company in approving of the transfer—Transferee's name not registered effect of—No default or unnecessary delay or absence of sufficient cause in dealing with shares—Liability of transferee as contributory

The applicant a shareholder in the Indian Specie Bank Ltd sold some of his shares to the respondents by various transfers which were lodged with the Company for registration The Company however went into liquidation before the transfers were in due course approved of by the Board of Directors According to the practice observed by the Company transfers lodged up to the end of the previous week were placed before the Board of Directors at their meeting in the following week The Company went into liquidation on the 29th of November 1913 At a meeting of the Board of Directors held on the previous day the transfers lodged in the previous week up to the 22nd of November only were considered The transfers in dispute were lodged with the Company between the 25th and 28th of November 1913 The applicant was accordingly placed by the liquidator on the list of contributories in Schedule A for the shares which stood in his name on the 29th of November 1913 The applicant contended that the register of share holders should be rectified by the Court under sections 58 and 147 of the Indian Companies Act (VI of 1882) by substituting the names of the respondents as transferees in place of his own name

Held that as the applicant had not proved that there was either absence of sufficient cause or default or unnecessary delay on the part of the Company in dealing with the transfers the register of share holders could not be rectified

* O C J Appeal No 50 of 1914

PROCEEDINGS in liquidation

Application for rectification of register of share-holders under section 58 of the Indian Companies Act (VI of 1882)

The applicant Sorabji Nusserwanji Pochkhanawalla held a large number of shares of the Indian Specie Bank, Limited By an order of the High Court of Bombay made on the 29th of November, the affairs of the said Company were ordered to be wound up

Prior to the 29th of November 1913 the applicant sold 381 shares to C A Patwardhan the Chief of Sangli, 25 to Damodar Hemandas, 30 to Girdharlal Harilal, and 5 to Jagjivandas Kahandas The transfers had been executed by the transferor and the transferees and had been lodged with the Company for registration between the 25th and 28th of November 1913 None of the transfers had been initialled by any of the Directors to show that they were approved of by the Board, and consequently the names of the transferees did not appear on the register of share-holders The applicant was accordingly placed on the list of contributories in Schedule A for all the shares which stood in his name on the 29th of November 1913 when the winding up commenced The applicant however contended that the names of the transferees as the equitable owners of the shares should be entered in place of his name in Schedule A in respect of the shares transferred, his name being relegated to Schedule B of the list of contributories

The practice of the Company in registering transfers was that only transfers lodged up to the end of the previous week were placed before the Board of Directors at their meeting in the following week The usual day for Board meetings was Tuesday On Tuesday the 25th of November 1913, there was no meeting

ORIGINAL CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Davar

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February 18

IN THE MATTER OF THE INDIAN COMPANIES ACT VI OF 1882 AND IN THE MATTER OF THE INDIAN SPECIE BANK, LTD (IN LIQUIDATION)

SORABJI NUSSERWANJI POCHKHANAWALLA (APPLICANT APPELLANT) *v* C A PATWARDHAN THE CHIEF OF SANGLI AND OTHERS (RESPONDENTS) *

The Indian Companies Act (VI of 1882) sections 58 147—Liquidation—List of contributories—Rectification of register of shareholders—Transfers signed by transferor and transferee and lodged before winding up of the Company—Practice of the Company in approving of the transfer—Transferee's name not registered effect of—No default or unnecessary delay or absence of sufficient cause in dealing with shares—Liability of transferee as contributory

The applicant a shareholder in the Indian Specie Bank Ltd sold some of his shares to the respondents by various transfers which were lodged with the Company for registration The Company however went into liquidation before the transfers were in due course approved of by the Board of Directors According to the practice observed by the Company transfers lodged up to the end of the previous week were placed before the Board of Directors at their meeting in the following week The Company went into liquidation on the 29th of November 1913 At a meeting of the Board of Directors held on the previous day the transfers lodged in the previous week up to the 22nd of November only were considered The transfers in dispute were lodged with the Company between the 25th and 28th of November 1913 The applicant was accordingly placed by the liquidator on the list of contributories in Schedule A for the shares which stood in his name on the 29th of November 1913 The applicant contended that the register of share holders should be rectified by the Court under sections 58 and 147 of the Indian Companies Act (VI of 1882) by substituting the names of the respondents as transferees in place of his own name

Held that as the applicant had not proved that there was either absence of sufficient cause or default or unnecessary delay on the part of the Company in dealing with the transfers the register of share holders could not be rectified

*O C J Appeal No 50 of 1914

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INDIAN SPECIE BANK LTD *In re* SORABJI NUSSERWANJI *v.* C A PATWARDHAN

PROCEEDINGS in liquidation

Application for rectification of register of share-holders under section 58 of the Indian Companies Act (VI of 1882)

The applicant Sorabji Nusserwanji Pochkhanawalla held a large number of shares of the Indian Specie Bank, Limited By an order of the High Court of Bombay made on the 29th of November, the affairs of the said Company were ordered to be wound-up

Prior to the 29th of November 1913 the applicant sold 384 shares to C A Patwardhan the Chief of Sangli, 25 to Damodar Hemandas 30 to Girdharlal Harilal, and 5 to Jagjivandas Kalandas The transfers had been executed by the transferor and the transferees and had been lodged with the Company for registration between the 25th and 28th of November 1913 None of the transfers had been initialled by any of the Directors to show that they were approved of by the Board, and consequently the names of the transferees did not appear on the register of share-holders The applicant was accordingly placed on the list of contributories in Schedule A for all the shares which stood in his name on the 29th of November 1913 when the winding up commenced The applicant however contended that the names of the transferees as the equitable owners of the shares should be entered in place of his name in *Schedule A in respect of the shares transferred, his name* being relegated to Schedule B of the list of contributories

The practice of the Company in registering transfers was that only transfers lodged up to the end of the previous week were placed before the Board of Directors at their meeting in the following week The usual day for Board meetings was Tuesday On Tuesday the 25th of November 1913, there was no meeting

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and the Board did not meet until Friday the 28th of November 1913 when transfers lodged in the previous week up to Saturday, the 22nd, were placed before them The transfers signed by the applicant and the respondent could not be and were not placed according to the practice of the Company before the Board of Directors on the 28th of November 1913

Macleod J held that there was no default or unnecessary delay on the part of the Company in dealing with the transfers lodged with the Company before the commencement of the winding up, and his Lordship accordingly dismissed the summonses issued at the instance of the applicant against the respondents

The following judgment was delivered by the learned Chamber Judge

MACLEOD, J —These are four summonses issued at the instance of S N Pochkhanawalla (hereinafter called the applicant) which were consolidated and adjourned into Court under the following circumstances

The applicant had been placed by the Liquidator on the list of contributories in Schedule A for a very large number of shares which stood in his name on the register of share-holders on the 29th November 1913 when the winding-up of the Company commenced

On the day fixed for the settling of the list of contributories, a great many persons appeared in answer to notices served upon them by the applicant, who wished to have their names substituted for his in Schedule A in respect of various lists of shares sold to them The four persons above-named appeared by counsel and as they were prepared to proceed with the hearing of the question in dispute, although the applicant should have taken out summonses according to the regular

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procedure, I commenced the hearing and directed the applicant to remedy the defect by applying for summonses which has now been done

The applicant before the winding-up commenced, sold 381 shares to Patvardhan 25 to Damodar Hemandas, 30 to Girdharlal Harilal and 5 to Jagjiwandas Kahandas the transfers had been executed by the transferor and his transferees and had been lodged with the Company for registration but they have not been initialled by any of the Directors to show they have been approved of by the Board and consequently the names of the transferees do not appear on the register of share-holders The applicant now contends that the names of those transferees should be entered in place of his name in Schedule A in respect of the shares so transferred by him, his name being relegated to Schedule B In the same way, the applicant had sold a number of shares to a number of other persons against whom summonses have been granted, and the decision in the present summonses will govern the result of those summonses

The following Articles of Association are relevant for the purpose of this case

45 Every such instrument of transfer shall be executed both by the transferor and transferee and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register of share holders in respect thereof and a fee of such amount as the Directors may from time to time direct not exceeding four annas per share shall be payable by the transferor in respect of every share transferred

46 The Board may decline to register any transfer of shares in respect whereof any share holder is indebted to the Company for calls interest or otherwise or whilst any sum of money is due from such share holder to the Company either solely or jointly on any account whatsoever

47 The Board may also decline to register any transfer of shares if the Board shall not approve of the proposed transferee and the Board shall not be obliged to give any reason for declining to do so The member desiring

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to sell his share shall in every case submit a writing in the following form for the approval by the Directors of the intended transferee if the Directors require to do so The registration of a transfer shall be conclusive evidence of the approval by the Directors of the transferee being a member of the Company

Under section 147 of the Indian Companies Act, 1882, which governs these proceedings, the Court has power when settling the list of contributories to rectify the register of members in all cases where such rectification is required in pursuance of section 58

Section 58 is as follows —

58 If the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members kept by any Company under this Act or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the Company the person or member aggrieved or any member of the Company or the Company itself may by application to the principal Court of original civil jurisdiction in the district or place in which the registered office of the Company is situate apply for an order of the Court that the register may be rectified and the Court may either refuse such application with or without costs to be paid by the applicant or it may if satisfied of the justice of the case make an order for the rectification of the register and may direct the Company to pay all the costs of such application and any damages the party aggrieved may have sustained

The Court may in any proceeding under this section decide any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register whether such question arises between two or more members or alleged members or between any members or alleged members and the Company and whether there has or has not been default on the part of the Company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register Provided that the Court may direct an issue to be tried in which any question of law may be raised and an appeal in the manner directed by the Code of Civil Procedure shall lie

This section does not appear to have been the subject of any reported decision of the Indian Courts but the corresponding section 35 of the English Companies' Act, 1862, has been a constant source of difference of

opinion amongst the learned Judges in decided English cases The word 'fraudulently' appears to have been inserted in section 58 in consequence of the decision in *Ex parte Kintrea*,[1] but it hardly appears necessary The words in the second part whether there has or has not been default on the part of the Company' appear to have been inserted as the result of the decision in *Ex parte Shaw*[2], but it does not seem that any importance need be attached to them as they have been omitted in the corresponding section 38 of the Indian Companies Act 1913

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The section runs as follows —

38 (1) If—

(*a*) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a Company or

(*b*) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member

the person aggrieved or any member of the Company or the Company may apply to the Court for rectification of the register

(2) The Court may either refuse the application or may order rectification of the register and payment by the Company of any damages sustained by any party aggrieved and may make such order as to costs as it in its discretion thinks fit

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register whether the question arises between members or alleged members or between members or alleged members on the one hand and the Company on the other hand and generally may decide any question necessary or expedient to be decided for rectification of the register

Provided that the Court may direct an issue to be tried in which any question of law may be raised and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure 1908 on the grounds mentioned in section 100 of that Code

[1] (1869) L R 5 Ch 95

[2] (1877) 2 Q B D 463

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This section, which has been redrafted to correspond with section 32 of the English Companies Act, 1908 shows how the first part of section 58 should be read viz,

If—

(*a*) the name of any person is fraudulently or without sufficient cause entered in, or omitted from, the register of members kept by the Company under this Act, or

(*b*) if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the Company

The word 'entered,' according to its ordinary grammatical construction, must refer to an original entry of a person on the register in respect of one or more shares and it is to the original entry that objection must be taken, and not to the fact that although the original entry is unimpeachable, circumstances have occurred which require the objector's name to be removed So the word 'omitted' must refer to an act of omission by the Company either by refusing or neglecting to place a certain name on the register But it may be said that a person rightly entered on the register who has sold his shares may complain that his transferee's name has been omitted without sufficient cause in which case he could apply under the first part of the section as well under the second, and that is in accord with the judgment of Brett L J in *Ex parte Shaw*[1] where he says 'It seems to me that no case can be within the section which is not within the first part of it but there may be cases within the first part that are not within the second' The decision in that case seems to set at rest the question whether in order to give jurisdiction to the Court to order rectification of the register under section 35 it was necessary

[1] (1877) 2 Q B D 463 at p 482

that there should be actual default or unnecessary delay by the Company Shaw instructed Smith to purchase for him forty shares in the Diamond Rock Boring Company Smith arranged with Sir E Piers to sell forty shares of which he was the registered owner Piers executed the transfer and sent it with the scrip to the Company for the transfer to be certified Piers then sent the transfer to Shaw who returned it executed to Smith Smith then disappeared with the transfer and the Company declined to register Shaw as the owner of the shares There was no question of any default on the part of the Company which submitted itself to the Court It was held the case came within the first part of the section which moreover, later on gave the Court jurisdiction to decide in any such proceeding any question of title between members or alleged members or between members and alleged members on the one hand and the Company on the other hand

It must be noted that in *Shaw s case*[1] the Company had refused to register Shaw as the owner of the forty shares, that the Company was not in liquidation and that there was a question in dispute between Shaw and Piers as to who was the owner of the shares In the present case there is no dispute regarding title between the applicant and his opponents No doubt when the bargain was completed and the transfers executed, the transferees became the equitable owners of the shares and the question is whether the register, which did not contain their names when the winding-up commenced, should be rectified by their names being entered

Mr Setalvad contended that this should be done irrespective of the question whether there was default or unnecessary delay on the part of the Company He

[1] (1877) 2 Q B D 463

B 690—8

relied on the decision of Malins V C in *Ward and Garfit's case* [1] On the 3rd May 1866, Garfit executed a transfer of forty shares in Overend, Gurney & Co, to Ward who executed the transfer on or before the 9th May when the transfer was lodged for registration with the Company The Company stopped business on the 10th May and a petition for winding-up was presented on the 11th Thereafter a voluntary winding-up was determined on by the shareholders and an order for continuing the winding-up under the supervision of the Court was made on the 17th June The Liquidators registered all the transfers lying at the Company's office at the time of the stoppage including the transfer to Ward The articles of Association contained Articles similar to Articles 45-48 of the Company in this case The Vice Chancellor said (p 196)

> The terms of the 35th section are very extensive and give a general power of which there are numerous instances and the Court may either with or without costs if it is satisfied of the justice of the case make an order to rectify the register generally That is an absolute power where the circumstances are such as in the opinion of the Court call for its exercise The Court is armed with power (which is the important part of the section) to decide any question necessary or expedient for the rectification of the register and I am now called on to decide whether the equitable title which is clearly vested in Mr Ward must not be completed by making it legal and whether he must not *fulfil all the* obligations which such legal title would throw upon him I am of opinion that I am armed with this power and that Mr Ward's name and not Mr Garfit's ought to be put on the register

In *Musgrave and Hart's case* [2] Malins V C expressed the same opinion as in *Ward's case* [1] but refused to rectify the register on the grounds that the purchaser had not executed the transfer before the winding-up order was made But the Vice Chancellor expressed the opinion that he would have done so but for the

(1) (1867) L R 4 Eq 189 (2) (1867) L R 5 Eq 193

recent decision of the Appeal Court in *Marino's case*[1] In that case the transfer had been sent to the Company for registration without being executed by the transferee It was proved that it had been the uniform usage for the Company to require the transfer to be executed by both transferor and transferee although the Company had not adopted the Schedule in the Act which made that imperative The Vice Chancellor quoted the following passage from the judgment of Turner L J whose liberal interpretation of section 35 met with the approval of the Appeal Court in *Ex parte Shaw*[2]

> The respondent has to make out *that the Company was guilty of default* in not taking his name off the register although according to their ordinary practice his name could not be taken off except upon production of a deed executed not only by himself as the transferor of the shares but by the *person to whom he transferred them*

In *Shepherd's case*[3] Shepherd sold five shares in the Joint Stock Discount Company to Higgs, both parties executing the transfer which was lodged on or before the 3rd March 1866 for registration with the Company On the 3rd March at a special meeting, the Directors resolved that no transfer of shares now in the office be registered without express sanction of the Board except to new Directors A petition for winding up the Company was presented on the 7th March and a winding-up order was made It seems that Higgs had no objection to being put on the register Romilly M R said (p 566)

> I think I cannot put Mr Higgs upon the register I am of opinion the directors had the power if they exercised it *bona fide* and considered it to be for the benefit of the Company to refuse to make the transfer That being so I am of opinion that the Official Liquidator had no power afterwards to put anyone else upon the list of share holders

(1) (1867) L R 2 Ch 596 (2) (1877) 2 Q B D 463
(3) (1867) L R 2 Eq 564 L R 2 Ch App 16

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In the Appeal Court Turner L J said, after quoting section 35

According to this section in order to maintain Mr Shepherd s case it is necessary for him to show that there was default or unnecessary delay on the part of the Company in entering on the register the transfer of his shares to Mr Higgs But how do the facts stand ? The transaction between Shepherd and Higgs takes place in the month of December the transfer is completed as between the parties but nothing is done as between either party and the Company until the 3rd of March According to the course of practice of this Company the ordinary meetings of the directors were held once a week and their last weekly meeting was on the 1st of March It was not therefore until the 8th of March that in the ordinary cour e of business of the Company the consideration of this trasfer could come under the notice of the directors But before the 8th of March arrived the Petition on which the winding up order was afterwards made had been presented I think therefore this is not a case in which it can be said that there was any default or any unnecessary delay on the part of the Company in entering the name of Higgs on the register [1]

It seems in this particular case when the transfer was not lodged in time to give the Directors an opportunity of considering whether it should be sanctioned or not the order of the Master of the Rolls was right, and Cairns L J says at page 21

It seems to me impo sible to say in the words of the Act of Parliament that on the 7th the day on which the winding up commenced and after which nothing could be done unnecessary delay had taken place in entering upon the register the fact of Mr Shepherd s having ceased to be a member

Malins V C in *Ward and Garfit's case*[2] says at page 196 with reference to this case

Shepherd's case[1] turned on the fact that the directors had exercised their discretion as to approving of a transferee and the Master of the Rolls and the Court of Appeal proceeded on this ground that the exercise of discretion could not be altered by the Court

With due respect it seems impossible to reconcile the Vice Chancellor s method of disposing of the

(1) (1867) L R 2 Ch App 16 at p 18
(2) (1867) L R 4 Eq 189 at p 196

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decision in *Shepherd's case*[1] either with the facts of the case or with the passages above quoted from the judgments of the Appeal Court. Moreover, the learned Vice Chancellor appears to have overlooked the fact that jurisdiction can only be exercised under the section where, without sufficient reason a person's name has been entered or omitted and it could not be said that a transferee's name had been omitted without sufficient reason when the Directors had had no opportunity of exercising their discretion or where, as in *Musgrave and Hart's case*[2] the transferor had not even executed the transfer.

The wide jurisdiction given by the second part of the section can only be exercised when grounds have been established under the first part for exercising such jurisdiction. If two parties are disputing as regards the ownership of a share the Company would be justified in declining to do anything until the dispute was settled, and in such a case the Courts may exercise their discretion in deciding the dispute in a summary way under section 58 though they will probably decline if the matter is in any way complicated. But the mere fact that a share-holder has made a contract with another party to sell his share cannot by itself bring about an omission by the Company without sufficient cause to enter the purchaser's name on the register of share-holders. If the Vice Chancellor's view was the right one, Higgs was the equitable owner on the 3rd March and, therefore Higgs' name had been omitted without sufficient cause. Then again the facts, as stated in the report, show that the Directors did not exercise any discretion as to approving the transferees, on the 3rd March they passed a resolution which, in

[1] (1866) L. R. 2 Eq. 564; L. R. 2 Ch. App. 16.
[2] (1867) L. R. 5 Eq. 193.

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the words of Cairns L J, amounted to saying "We reserve to ourselves the sole exercise of the right to look into the circumstances of each transfer, and we give notice to our officer that, until we have pronounced an opinion upon the transfers, he is not to register them "[1]

There can be little doubt that if *Ward and Garfit's case*[2] had come before the same Bench they would have refused to put Ward s name on the register

In *Nation's case*,[3] which also arose out of the winding up of the Joint Stock Discount Co, the transfer by Nation in favour of Binney was lodged with the Company for registration on the 17th February On the 28th February, in consequence of a resolution passed at a General Meeting of the Company, nearly all the Directors resigned and new Directors were elected On the 1st March an Ordinary Meeting of Directors was held, but no transfers were brought before the Directors at that Meeting Nation having been placed on the list of contributories applied that the list might be varied by excluding his name and substituting Binney Lord Romilly M R allowed the application on the ground that there had been unnecessary delay, because the transfer was not confirmed at the Meeting of the Directors on the 1st March at which, in the ordinary course of business, it would have been confirmed

In *Walker's case*[4] the contract to sell certain shares was made after the winding-up commenced, but before the winding up order was made the transferee did not execute the transfer The transferor applied to have the purchaser registered as the owner of the shares Kindersley V C in refusing the application, said

(1) (1866) L R 2 Ch 16 at p 20
(2) (1867) L R 4 Eq 189
(3) (1866) L R 3 Eq 77
(4) (1866) L R 2 Eq 554

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It has been contended that the parties may supersede the necessity of bringing the matter before the board of directors; but the board of directors had the right to determine whether they would accept the transferee or not, and this Court has no power to deprive them of that right or to substitute its own discretion for theirs, and so direct that the transferee shall be registered as a shareholder.

It seems however that, in the opinion of Romilly M. R. and Turner L. J. if the Directors have had an opportunity of exercising their discretion before the winding up and have not exercised it, that amounts to delay which entitles the Court to act as if they had exercised their discretion. In *Fyfe's case, In re Joint Stock Discount Co.*(1) Giffard L. J. followed the decisions in *Nation's case* and in *Shepherd's case* removing the applicant's name from the register on the ground that there had been delay and neglect on the part of the Company in not registering the transfer on the 1st March.

In *Marshall v. Glamorgan Iron and Coal Co.*,(2) Giffard V. C. said:

Again, if a man being a shareholder has sold his shares, he is not relieved from being a contributory if, owing either to his own neglect or that of his transferee, or if, in fact, owing to any cause except the neglect of the Company, his transferee's name has not been substituted for his at the date of the winding up. If the omission to substitute the name of the transferee is owing entirely to the neglect and default of the Company he will be relieved.

In *Ward and Henry's case*(3) the facts were that Ward sold shares to Stafford through a broker Henry and executed a transfer which Stafford did not register. Stafford agreed to sell the shares to Henry but refused to execute a transfer. Henry then persuaded Ward to execute a fresh transfer to him which Henry took in for registration, but the Directors in consequence of a

(1) (1869) L. R. 4 Ch. 768. (2) (1868) L. R. 7 Eq. 129 at p. 137.

(3) (1867) L. R. 2 Ch. 431.

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notice from Stafford refused to register it Henry filed a bill against Stafford for specific performance to which Stafford put in an answer Ten days later a petition for winding-up was presented on which a winding-up order was made The master of the Rolls put Henry on the list of contributories On appeal, Turner, L J held that the Court had jurisdiction under section 35 but the case was one in which the jurisdiction should not be exercised Cairns L J held that there had been no *default on the part of the Company and there was*, therefore, no case for the rectification of the register Though it must now be taken as settled law that under section 35 of the English Companies Act, 1862, the Courts had, and under section 32 of the Indian Companies Act, 1908 the Courts have, jurisdiction to decide questions in dispute between members and alleged members whether or not there has been default on the part of the Company, still that jurisdiction will not be exercised after a winding-up has commenced unless there has been default or unnecessary delay on the part of the Company Even if there has been such default or delay the Court will not rectify the register at the instance of the Liquidator *Sichell's case*[1], see Buckley, p 86(9th edn) and Halsbury's Laws of England, Vol V, p 498 If it was not for the decision of Malins, V C in *Ward and Garfit's case*[2] the applicant's contention would be unarguable, but both the learned authors above mentioned, while ignoring that decision, rely on the higher authority of *Shepherd's case*[3] for the proposition they lay down, which has never been considered as having been over ruled by the decision in *Shaw's case*[4], in which there was a question of disputed ownership of shares in a going concern, which the

(1) (1867) L R 3 Ch 119 (2) (1867) L R 4 Eq 189
(3) (1866) L R 2 Eq 564 L R 2 Ch 16
(4) (1877) 2 Q B D 463 at p 482

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Directors left to be decided by the Court In the case of the register of a Company being wound up, it has been said that as the tree falls so it must lie The register must be correct unless there has been default or delay on the part of the Company In other words the applicant must show sufficient reason for the omission of the respondent's name on the register and there can be no sufficient reason unless there has been default or delay on the part of the Company Evidence has been given on affidavit and *viva voce* regarding the practice of this Company in registering transfers On behalf of the applicant it is alleged that the practice was for all transfers received up to the day before a Directors Meeting to be placed before the Board, on behalf of the respondents that only transfers lodged up to the end of the previous week were placed before the Board at their Meeting in the following week

The usual day for Board Meetings was Tuesday On the 25th November, there was no Meeting as the Manager was too busy engaged in certain Court matters The Board did not meet until Friday the 28th when it seems that transfers lodged up to Saturday the 22nd were placed before them At least one transfer lodged after the 22nd was placed before them especially for disapproval as the transferee was a minor

The transfers signed by Patvardhan were lodged with the Company as follows —

1 Tr	65 Shares	On the 25th November
2 Tr	95	Do
3 Tr	5	Do
4 Tr	5	Do
5 Tr	5	Do
6 Tr	10	On the 26th November
7 Tr	10	On the 27th November
8 Tr	10	On the 27th November
9 Tr	10	On the 27th November
10 Tr	159	Undated but from its serial number lodged presumably on the 28th November

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notice from Stafford refused to register it Henry filed a bill against Stafford for specific performance to which Stafford put in an answer Ten days later a petition for winding-up was presented on which a winding-up order was made The master of the Rolls put Henry on the list of contributories On appeal, Turner, L J held that the Court had jurisdiction under section 35 but the case was one in which the jurisdiction should not be exercised Cairns L J held that there had been no default on the part of the Company and there was, therefore, no case for the rectification of the register Though it must now be taken as settled law that under section 35 of the English Companies Act, 1862, the Courts had, and under section 32 of the Indian Companies Act, 1908 the Courts have, jurisdiction to decide questions in dispute between members and alleged members whether or not there has been default on the part of the Company still that jurisdiction will not be exercised after a winding-up has commenced unless there has been default or unnecessary delay on the part of the Company Even if there has been such default or delay the Court will not rectify the register at the instance of the Liquidator *Sichell's case*[1], see Buckley, p 86(9th edn) and Halsbury's Laws of England, Vol V, p 498 If it was not for the decision of Malins, V C in *Ward and Garfit's case*[2] the applicant's contention would be unarguable, but both the learned authors above mentioned, while ignoring that decision, rely on the higher authority of *Shepherd's case*[3] for the proposition they lay down which has never been considered as having been over ruled by the decision in *Shaw's case*[4] in which there was a question of disputed ownership of shares in a going concern, which the

(1) (1867) L R 3 Ch 119 (2) (1867) L R 4 Eq 189

(3) (1866) L R 2 Eq 564 L R 2 Ch 16

(4) (1877) 2 Q B D 463 at p 482

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Directors left to be decided by the Court In the case of the register of a Company being wound up, it has been said that as the tree falls so it must lie The register must be correct unless there has been default or delay on the part of the Company In other words the applicant must show sufficient reason for the omission of the respondent s name on the register and there can be no sufficient reason unless there has been default or delay on the part of the Company Evidence has been given on affidavit and *viva voce* regarding the practice of this Company in registering transfers On behalf of the applicant it is alleged that the practice was for all transfers received up to the day before a Directors Meeting to be placed before the Board on behalf of the respondents that only transfers lodged up to the end of the previous week were placed before the Board at their Meeting in the following week

The usual day for Board Meetings was Tuesday On the 25th November there was no Meeting as the Manager was too busy engaged in certain Court matters The Board did not meet until Friday the 28th when it seems that transfers lodged up to Saturday the 22nd were placed before them At least one transfer lodged after the 22nd was placed before them especially for disapproval as the transferee was a minor

The transfers signed by Patwardhan were lodged with the Company as follows —

1 Tr	65 Shares	On the 25th November
2 Tr	95	Do
3 Tr	5	Do
4 Tr	5	Do
5 Tr	5	Do
6 Tr	10	On the 26th November
7 Tr	10	On the 27th November
8 Tr	10	On the 27th November
9 Tr	10	On the 27th November
10 Tr	159	Undated but from its serial number lodged presumably on the 28th November

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The transfer signed by D Harnamdas was lodged on the 27th November

The transfer signed by Girdharilal H Mehta was lodged on 27th or 28th

And the transfer signed by Jagjivandas K Shah was lodged on the 27th Obviously if the Meeting had been held on the usual day all these transfers were lodged too late to be placed before the Board

The only Director who was called to give evidence was Sir Jugmohandas Varjivandas He said the usual practice was for transfers completed in the previous week to be put before the Board at their Meeting in the following week The transfers were initialled by the Manager, Chunilal or his assistant Vithaldas to show there was no objection to the transfer and when so initialled they were approved by the Board without further inquiry The Directors initialled the transfers, if approved They might initial them before the actual business of the Meeting commenced The minutes of Directors' Meetings do not show the serial numbers of the transfers which were approved of by the Directors, but only the numbers of those transfers which were not approved It has been argued that because the transfer of share No 56342 which was lodged on the 26th November 1913 was rejected all transfers lodged up to the 26th November were placed before the Board and approved, but it is quite clear that no transfer which has not been initialled by the Directors can be said to have been approved by the board The above mentioned transfer was brought before the Board at once to be rejected so that the vendor and the purchaser might know as soon as possible that the transfer would not be allowed In re examination Sir Jugmohandas said that there was nothing to prevent Chunilal and Vithaldas placing before the Board transfers lodged

on the day previous to the Meeting None of the other Directors have come forward to depose that the practice was otherwise than as stated by Sir Jugmohandas I do not attach much importance to the evidence of Hiralal Motiram who does not seem to have been actually attached to the Share Department Purshotam Vasudev was the counter-clerk in the Share Department It was his duty to receive transfers and see that the signatures were in order If they were he took the transfer to the clerk in charge of the Department for him to initial it In the evening receipts were made out for the shares lodged for transfers during the day The following day, the transfers with the shares and receipt forms were sent to the Managing director and would come back within an hour or so The witness kept a rough register book in which transfers were entered but I could not get from him a satisfactory answer to the question when this register was made up He first said "on the evening of the day on which an application was received it was entered on the rough register" Then he said the rough register was made up from the receipt-book when the application was received back from the managing Director' Finally he said, 'I entered the particulars on the rough register the day I received the application' The witness also said that Board meetings were generally held on a Tuesday Transfer forms received from the last Tuesday up to *the Monday before the Meeting were placed before the* Board He used to make the transfers into a bundle and put them the same day on the desk of the clerk in charge who sent them to the Directors Before the 28th November work had fallen into arrears and therefore all the transfers could not be sent up as usual He said the practice was not to send up transfers to the Board before they were entered in the rough register, but this statement was not quite correct, or, at any rate,

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the practice was not observed during the last week At the last Meeting transfers received before the 23rd November were placed before the Board and a great many of them had not been entered in the rough register It must be noted that this witness, whatever the actual practice was, had nothing whatever to do with the decision as to what forms should be placed before the Board that was the duty of the clerk in charge of the Share Department Mathuradas was the clerk in charge from 1907 until May 1913 when he was appointed the Manager of the Poona Branch He used to send the transfers up to the Board Meetings He was very positive that his practice was to send up transfers which had been lodged up to the Saturday previous to the day on which the Board Meeting was held There was nothing unreasonable in such a practice nor was there any reason why the witness, who appeared to me to be a most respectable man, should say that he did not send up forms lodged on a Monday if, as a matter of fact, he usually did so When he took charge of the Department he found there was no settled practice and so he instituted the practice he deposed to If there was any doubt about a transfer form or if there were reasons for objecting to it it might be placed before the Board at once in order that the purchaser might have notice as soon as possible

It was the duty of the witness to make enquiries about the purchasers and to report to the Managing Director

It certainly does appear from the records that at the Board Meetings held after the transfer books were re-opened after being closed for issue of dividend warrants, transfers lodged on the previous day may have been placed before the Board for approval, but there is no certainty about that since the minutes do not give particulars of transfers approved but only of tranfers

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rejected Mathuradas did say that on such occasions such applications as were complete could be placed before the Board but that would not be possible with applications lodged the day before The fact that a transfer lodged on the previous day was rejected by the Board the next day does not prove as I have already shown, that all the other transfers lodged that day were placed before the Board and approved After Mathuradas left one Khandwalla took his place but he frankly admitted he knew nothing about the business and did not know up to what day transfers submitted to a Board Meeting had been lodged

Vithaldas Parekh was assistant to the Managing Director and used to initial transfers from August 1913 He said, as far as he knew, applications received up to the day previous to the Board Meeting were presented to the Board, but he had to admit it was not a part of his duty to see which forms were submitted to the Directors and he could not say what was the practice of the Head of the Share Department when putting transfer forms before the Board He was directly interested in these proceedings as he had sold fifty shares and lodged the transfer on the 25th November Pereira, the ledger-clerk, said that transfer forms lodged prior to the day of the Directors' Meeting generally came to him to be posted, after having been approved by the Board, but all the witness had to do was to post the transfers in the ledger, and in cross examination he said it was generally a week before the Directors approved a transfer after it was lodged The witness seemed to me to have been brought to depose to a practice about which he knew nothing I asked him whether it was his business to consider how many days had elapsed between the date on which the transfer had been lodged and the date of the Directors' Meeting at which it was approved and he said no

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It is impossible, therefore on this evidence, to come to the conclusion that, according to the usual practice, transfers lodged up to the day before a Directors' Meeting were placed before the Board It is not even certain that the transfers were entered in the rough register before they were initialled by the Managing Director and if they were entered after being so initialled they could not, in the ordinary course, have been placed before the Board until the second day at the earliest Even by the 28th November all the transfers lodged up to the 22nd had not been registered while those *lodged up to the 27th November* had been initialled by Vithaldas But even assuming that in the ordinary course of business transfers lodged the day before the Meeting were placed before the Board, it cannot be said under the particular circumstances of this case that there was any unnecessary delay in not approving, on the 28th, transfers lodged on the 25th and after A petition to wind up the Company had been admitted on the 19th with the result that a very large number of share-holders came out to sell their shares The staff of the Bank was quite unable to cope with the rush of transfers so that on the 28th November even those which had been lodged up to the 22nd November had not been regularly dealt with Therefore, it was quite impossible to deal with transfers lodged after the 22nd except, in the most cursory fashion, for the purpose of seeing whether there was any objection on the face of the transfers which would necessarily lead to their rejection Considering the allegations made in the petition of the 19th regarding the affairs of the Company the Directors would only have been doing their duty if they had refused to deal with any further transfers until they had satisfied themselves that those allegations had no foundations in fact, but it seems that without making any inquiries they were prepared to go on

approving as many transfers as were placed before them The fact that practically all the transfers lodged up to the 22nd November were placed before the Board although in consequence of their number they had not all been entered in the rough register adds considerable support to the evidence of Mathuradas Therefore I find that the usual practice was to collect transfers up to a Saturday and put only those before the Board at their Meeting in the week following whether it was held on Tuesday or on a later day in the week Even assuming that transfers lodged up to the day before the Meeting were placed before the Board it was impossible to do this at the Meeting of the 28th owing to the enormous number of transfers Therefore in no case was there default or unnecessary delay in dealing with the transfers in these summonses

In particular the applicant can have no case as regards the transfers out of those for 139 shares evidently lodged on the 28th November which were incomplete owing to alterations not having been initialled by both parties and which would not, in any event, have been placed before the Board

The Liquidator has rightly taken no part in these proceedings except to assist the Court when required

The applicant thereupon appealed

Setalvad and *Kanga* for the appellant

Strangman, Advocate General, and *Inverarity*, for respondent No 1

Jinnah and *Desai* for respondents Nos 2, 3 and 4

Campbell, for respondent No 5

Setalvad —Purchase of shares complete on signing of transfers Ownership has passed to the transferee, and the register of shareholders must be rectified This should have been irrespective of delay Transferor

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entitled to indemnity No concern of his whether shares actually transferred in register Contract of sale does not imply any undertaking that names will be changed on register Transferee must indemnify transferor against calls *Loring* v *Davis*(1), *London Founders Association* v *Clarke*(2), *Kellock* v *Enthoven*(3) Section 58 applies "whether there has or has not been default on the part of the Company" These words were omitted from section 32 of the Act of 1908 In England if the Court is satisfied that title is in purchaser it will order registration See *Ward's case*(4), *Shepherd's case*(5), *Ex parte Shaw*(6), *Ward and Garfit s case*(7), *Walker's case*(8), *Musgrave and Hart's case*(9) *Nation s case*(10)

SCOTT, C J —This appeal arises out of a decision of the learned Chamber Judge upon four summonses taken out in the matter of the liquidation of the Indian Specie Bank In those summonses the applicant, Sorabji Nusserwanji Pochkhanawalla calls upon the opposing parties, C A Patwardhan Damodardas Hemandas Girdharlal Harilal Mehta and Jagjiwandas Kahandas Shah to show cause why the list of contributories should not be amended by substituting their names in place of the name of the applicant in regard to the shares specified in the summonses The application is made under section 58 of the Indian Companies Act (VI of 1882) and the Court is asked to make an order upon the summonses on the ground that it has the power under section 147 of settling the list and rectifying the register in cases in which such rectification is required in pursuance of section 58 Section 58 provides that

(1) (1886) 32 Ch D 625 (2) (1888) 20 Q B D 576

(3) (1874) L R 9 Q B 241 (4) (1866) L R 2 Eq 226

(5) (1866) L R 2 Eq 564 L R 2 Ch 16

(6) (1877) 2 Q B D 463 (7) (1867) L R 4 Eq 189

(8) (1866) L R 2 Eq 554 (9) (1867) L R 5 Eq 193

(10) (1866) L R 3 Eq 77

if the name of any person is fraudulently or without sufficient cause entered in, or omitted from, the register of members kept by any Company, or if default is made or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the Company the person or member aggrieved or any member of the Company or the Company itself, may make an application for the rectification of the register

Cases in which an application may be made concern, therefore, the acts or omissions of the Company keeping the register In the case of an omission appearing by reason of the fact of a person having ceased to be a member not being entered in the register, it is necessary to show that default has been made or unnecessary delay has taken place on the part of the Company keeping the register In all other cases, it is enough to show that the name of some person is fraudulently or without sufficient cause entered in, or omitted from, the register kept by the Company Thus the evidence in every case must be directed to the acts or omissions of the Company

In the present case, the grievance is that the applicant, having sold his shares to the opponents on the summonses before the order for winding up was made, has not been entered on the register as having ceased to be a member and it would, therefore, seem that it is necessary to show default or unnecessary delay in entering that fact in the register on the part of the Company But even if we assume that, as argued on behalf of the applicant, the case may be treated as a case of omission from the register of a person who is not complaining of the omission, still an absence of sufficient cause has to be shown, and we are of opinion that upon the evidence, no absence of sufficient cause, no default and no unnecessary delay is proved

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For these reasons we think that the learned Judge was right in the order passed by him which we now affirm and we dismiss the appeal with costs

Attorneys for appellant Messrs *Payne & Co*

Attorneys for respondent No 1 Messrs *Dhanjishah & Batliwala*

Attorneys for respondents Nos 2, 3, 4 Messrs *Bhaishankar Kanga & Girdharlal*

Attorneys for respondent No 5 Messrs *Little & Co*

Appeal dismissed

G G N

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

1915 *August 18*

HARKISANDAS SHIVLAL AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS *v* CHHAGANLAL NARSIDAS AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS[°]

Civil Procedure Code (Act V of 1908) Order I rule 8—Suit by plaintiffs as representing the section of a caste to take account and to recover moneys belonging to the section—Meeting not properly convened—Suit opposed by numerous members of the section—Suit as representing the plaintiffs supported by a large number of the members—Representative suit not maintainable

The caste of the Dasa Lad Banias of Broach was divided into two sections known as the Mojumpurias and Sheheris The accounts and the funds of each section were separately kept by defendant No 1 who was the headman of the whole caste The plaintiffs were authorised to bring the present suit at a meeting at the Mojumpuria section held on the 28th April 1909 It appeared that the meeting was irregularly convened The plaintiffs brought the present suit under Order I Rule 8 of the Civil Procedure Code to take accounts of the funds belonging to the Mojumpuria section from defendant

[°] Second Appeal No 544 of 1913

No 1 and to recover from them the amount that might be found due on such accounts being taken Out of the 183 members constituting the Mojumpuria section 112 supported the plaintiffs contentions whilst 70 members supported those of defendant No 1 The First Court granted the reliefs sought but the District Court disallowed the second relief On second appeal —

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Held that the suit as constituted must fail for the plaintiffs could not represent nor sue on behalf of those numerous members of the Mojumpur section who admittedly were in diametrical opposition to them in the present controversy

Held also that the plaintiffs could not call in aid the private expressions of consent obtained after suit filed so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed

SECOND appeal from the decision of P J Taleyarkhan, District Judge of Broach, varying the decree passed by Vadilal T Parekh, First Class Subordinate Judge at Broach

Suit for taking accounts and recovering money

The Dasa Lad Bania caste of Broach was divided into two sections The one was known as Mojumpurias, and the other as Sheherias Each section had its own funds, of which separate accounts were kept The account-books and the funds were with defendant No 1 who was the *sheth* or headman of the whole caste

On the 28th April 1909, a meeting of the Mojumpuria section was held, at which a resolution was passed authorizing the plaintiff to sue defendant No 1 for taking account of his management of the funds belonging to the section, and to recover the funds from him The meeting was not convened in the usual way and not held at the usual place It was attended by 58 members of the caste, of whom only 38 were *lahanavallas*, *i e*, persons qualified to vote, out of 183 *lahanavallas* in the section

The plaintiffs brought the present suit, under the provisions of Order I, Rule 8 of the Civil Procedure Code, to take accounts of the funds belonging to the

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Mojumpuria section, and to recover from him the amou that may be found due on such accounts being take

In the course of the suit, 70 members of the Mojur puria section, appeared and supported defendant No in his contention that the meeting of the 28th April 19 was not properly convened 112 members of t section presented applications supporting the plainti position

The Subordinate Judge granted both reliefs sough holding that the meeting of the 28th April 1909 w properly convened, and that the plaintiffs were du authorised to bring the suit

The District Judge, on appeal, was of opinion th the meeting was not regularly convened He, ther fore, declined to grant the second relief, on the follow ing grounds —

It is proved by the evidence of plaintiffs own witnesses that the meeti in question was not duly convened That being the case those who ke away from it were within their rights in doing so and the resolution passed the meeting could not bind them nor could it be treated as a resolution of t Mojumpur section It was merely a resolution of the persons who has pass it and it could not for a moment be said that the plaintiffs were authoris *by the Mojumpur section* to bring the suit It is not a Mojumpur section or majority of that section that wants to get the funds into its own hands b only a minority composed of fifty eight members of the section who wishes do so The case reported in I L R 10 Bom 507 has therefore application here and the Court cannot give effect to the resolution which the suit is based * * * * *

Moreover defendant 1 is admittedly in management of immoveable prope ties which belong to the entire caste and could only be in management there for the entire caste and not for the sections composing it A substantial pa of the caste fund consists of three endowments admittedly made to the enti caste for giving caste feasts on certain days The amounts of these endow ments have been divided into two equal shares and one such share credited in th account of each section This must have been presumably done by the entir caste for as I said above the endowments were made for the benefit of th entire caste and not for each section separately The feasts are given to th entire caste and not to each section separately and the expenses are equall

divided between the two and debited to their respective accounts Now if the Mojumpur people get all the money in the Mojumpur *khata* into their own hands this arrangement would be upset But it is obvious that the arrangement could not be upset except with the concurrence of the entire caste The Court cannot do anything which would bring about that result for that would be an interference with the autonomy of the caste It appears that latterly defendant No 1 had made an unauthorized alteration in the accounts in relation to these endowments He had removed the credit items relating to the endowments from the *khatas* of the two sections and instead opened new *khatas* in the names of the donors and transferred the items to those *khatas*

If the alteration in the mode of keeping accounts was prejudicial it was no more prejudicial to the Mojumpur section than to the city section It is true that the alteration was unauthorized But the proper remedy of the plaintiffs and their partisans was to move the caste to rescind the alteration and not come to Court to get half of the endowment money into their own hands Defendant No 1 is in custody of the cash placed to the credit of the Mojumpur section in pursuance of the scheme under which the two separate funds have been formed and are being added to by the caste from the caste endowments and the revenues of the caste properties He is in my opinion not the agent of this or that section but is a trustee of the whole caste The character and extent of his responsibility to the sections are the same as those of any trustee of a caste to a member of the caste He does not hold the funds in question as agent of the Mojumpur section but as trustee of the caste and cannot part with them without the orders of the caste

The plaintiffs appealed to the High Court whilst defendants filed cross objections to the decree

B J Desai, with *T R Desai*, for the appellants — We represent the Mojumpur faction The suit has been brought by us on behalf of the faction under the provisions of Order I, Rule 8 of the Civil Procedure Code, 1908 The plaintiffs were authorized to bring the suit at a meeting of the faction, where a resolution was passed by 56 members out of 180 members constituting the faction Thus, at the meeting 56 members supported the plaintiffs , but since the institution of the suit other members have put in an application supporting the plaintiffs and some members have written letters approving of the plaintiffs' action These with 56 members who passed the resolution, number 110

Hence, it appears that the plaintiffs are supported by 110 members, when only 72 members *support the* defendant. The lower appellate Court has held that the meeting of the faction was not duly convened, and the resolution passed was not valid and legal. Even if that finding were accepted, the present suit should be maintained, supported as it now appears by a large majority of the faction. See *Lalji Shamji* v. *Walji Wardhman* [1].

H. C. Coyaji, with *D. A. Khare*, for respondents Nos. 1 to 4, 6, 7, 9, 10, 13, 14, 16, 18, 21, 25 to 27, 31 to 36, 38 to 40, 42, 45, 48, 51, 52, 59 and 62, was not called upon.

BATCHELOR, J. :—The plaintiffs, who are the appellants before us, are, like the defendants, members of a caste known as the Dasa Lad Banias of Broach, and the caste is divided into two sections known as the Mojumpurias, (Mojumpur being a hamlet of Broach in which certain members of the caste lived or used to live), and the Sheherias or the city section. The plaintiffs belonged to the Mojumpur section, while the principal defendants belonged to the Sheheria section. The plaintiffs in their plaint set out that they were authorized by the Mojumpur section on the 18th of April 1909 to bring this suit, which they accordingly did bring under Order I, Rule 8 of the Civil Procedure Code, as representing the members of the Mojumpur section. The object of the suit was to depose the 1st defendant from the position which he appears to occupy both in the Mojumpuria and in the Sheheria sections of the caste, and the principal prayers made in the plaint were that the accounts of the Mojumpur section should be settled from Samvat 1953, and that the 1st defendant should be compelled to pay to the plaintiffs the amount that might be found due upon those accounts being taken.

(1) (1895) 19 Bom. 507.

The trial Court made a decree in favour of the plaintiffs, but upon appeal that decree was amended by the learned District Judge who refused the prayer that the 1st defendant should be called upon to refund the moneys due to the Mojumpur section, though he allowed the plaintiffs claim to the extent that accounts should be taken from the 1st defendant From that decree the plaintiffs bring this present appeal while the respondents have filed cross objections in respect to that portion of the decree which was in the plaintiffs' favour

We have had a very careful argument from Mr Desai on behalf of the plaintiffs appellants but I am of opinion that this suit was misconceived and must fail As I have shown, the plaintiffs purported to be suing on behalf of the whole Mojumpur section, or sub caste by virtue of Order I, Rule 8 But it seems to me clear upon the very face of things that the plaintiffs could not, under Order I, Rule 8 sue on behalf of those numerous members of the Mojumpur section who admittedly were and are in diametrical opposition to them in this present controversy In no sense could those persons be said, I think, to be represented by the plaintiffs in this suit For in no sense could it be said, as the language of the Rule requires, that they and the plaintiffs hold the same interest in the suit and that the plaintiffs in bringing this suit were suing for or on behalf of these dissentient members But then it was said that in any event the suit was good, considered as brought by the plaintiffs for themselves and for those members of the Mojumpur section who at the meeting of 18th of April 1909 recorded their opinions in favour of the plaintiffs' views There however the difficulty is the learned appellate Judge's finding of fact that this meeting was irregularly convened and Mr Desai has very properly and candidly admitted that that finding of fact is binding upon him in second appeal

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The result, therefore, is that the constitution of this suit cannot be justified by reason of anything that took place at the meeting of the 18th of April 1909 That difficulty was, as I understand, admitted by Mr Desai who, however, sought to remove it by reference to events that occurred after the filing of the suit, and the contention was that, although at the date of the filing of the suit, the plaintiffs were without that authority upon which they purported to base their suit, yet such authority was subsequently supplied to them by the circumstance that after the filing of the suit numerous members of the Mojumpur section communicated to the plaintiffs their adherence to the position which the plaintiffs were adopting Thus by the application, Exhibit 73, 42 such members expressed their adherence By the letters and postcards, Exhibits 74 to 87, 14 other members gave a like expression of opinion The total, according to Mr Desai's calculation, would give 112 members consenting to the plaintiffs' action out of a total membership of 183 Now it was admitted in the course of the argument that in this matter there is neither statutory law nor custom which can guide us to a decision, and that in consequence under the Regulation of 1827 our determination must be founded upon equity and good conscience But it seems to me that the rules of equity and good conscience forbid the inference that an expression of opinion obtained in private after a suit filed is on the same level as the open casting of a man's vote at a public meeting For, at the public meeting there are his friends to support him, and there are his adversaries to correct him or any other member on his side if any misrepresentation or exaggeration should be used in argument whereas opinions obtained by one party in private behind the back of the other party may be obtained by inducements or representations which, if they were known to the Court, would not

be approved by the Court I think, therefore, that it is not possible to call in aid these private expressions of consent obtained after suit filed so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed That being so, the suit as constituted must, I think, fail

We have carefully considered whether under Order 6, Rule 17, we ought not to allow, even at this late stage of the litigation, the plaintiffs to amend their plaint I am of opinion that permission ought not to be granted for the reason that if it were granted, it would expose the defendants to an injury which could not be compensated in costs For the amendment of the plaint in the manner suggested would alter the whole fabric and character of the suit and however the amended claims might be worded, the result would be that they would be claims now sprung upon the defendants for the first time, claims which the defendants up till now have never had any opportunity either of considering or of resisting

In my opinion, therefore, the whole suit fails and should be dismissed with costs throughout

HAYWARD, J :—I entirely concur

Suit dismissed

R. R.

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

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MANILAL GANGADAS DESAI AND OTHERS (ORIGINAL DEFENDANTS NOS 3 TO 7 AND 9 TO 12) APPELLANTS *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS 1 AND 2) RESPONDENTS *

Bombay District Municipalities Act (Bombay Act III of 1901) section 42† *—Liability of Councillors for misapplied funds—Misapplication by Secretary and accounts clerk of the Municipality—Misapplication interpretation of—Suit by the Secretary of State for India in Council*

The Secretary of State for India in Council sued to recover a sum of money from the defendants the first two of whom were the Secretary and Accounts Clerk of a Municipality the rest being the Councillors thereof The sum claimed was the Municipal money embezzled by defendants Nos 1 and 2 The liability of the remaining defendants (defendants Nos 3 to 12) was based upon section 42 of the Bombay District Municipalities Act (Bombay Act III of 1901) Defendants Nos 3 to 12 contended that section 42 was not applicable inasmuch as the embezzlements by the paid servants of the Municipality would not amount to misapplication of the Municipal funds within the meaning of the section The lower Court overruled the contention and decreed the suit The defendants Nos 3 to 12 having appealed to the High Court —

Held confirming the decree that the operation of section 42 of the Bombay District Municipalities Act (Bombay Act III of 1901) was not restricted to misapplications made by any Councillor or Councillors, but it applies to any misapplication by whomsoever made

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*First Appeal No 21 of 1913

†The section runs as follows —

Every councillor shall be personally liable for the misapplication of any fund to which he shall have been a party or which shall have happened through or been facilitated by gross neglect of his duty as a councillor and may be sued for recovery of the moneys so misapplied as if such moneys had been the property of Government

Provided that no councillor shall be personally liable in respect of any contract or agreement made or for any expense incurred by or on b half of the Municipality the funds at the disposal of each Municipality shall be liable for and be charged with all costs in respect of any such contract or agreement and all such expenses.'

Per Batchelor J — The context in which the word misapplication occurs indicates that the word is employed rather in the broad and popular sense than in the narrow or etymological sense There is no requirement that the misapplication must be by the Councillors themselves or by any specified persons whatsoever and the use of the passive word happened seems to suggest also that the scope of the section extends to a misappropriation of the Municipal funds by a Municipal employee provided only that the misappropriation was facilitated by the Councillors gross neglect of their duties

Per Hayward J — Any diversion of funds however caused from their proper purposes would be covered by the wide term misapplication and it is in that wide sense that the term has been introduced into section 42 of the Act. It has purposely not been restricted to a misapplication to which a Councillor shall have been a party but has been applied expressly to a misapplication which shall have happened through or been facilitated by gross neglect of duty by a Councillor that is to say which has happened by any other agency through the gross neglect of a Councillor

Appeal from the decision of B C Kennedy, District Judge of Ahmedabad

Suit to recover a sum of money

The amount in suit was embezzled by defendant No 1 who was the Secretary of the Kaira Municipality and defendant No 2, who was the accounts clerk of the Municipality It consisted of three items of Rs 200, Rs 81-13 6 and Rs 425, which were falsely debited in the account books of the Municipality as having been paid to a contractor named Yasin The defalcations complained of occurred from December 1903 to February 1904 About this period the defendants Nos 3 to 12 were Councillors of the Municipality composing the Managing Committee, and some of them were appointed auditors

The Kaira Municipality was superseded by Government on the 22nd May 1909, under section 179 (1) of the Bombay District Municipalities Act (Bombay Act III of 1901) It was re-constituted on the 16th August 1912.

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In the meanwhile, on the 24th August 1910, the Secretary of State for India in Council filed the present suit to recover the amount embezzled with interest from the defendants The liability of defendants Nos 3 to 12 was based upon the provisions of section 42 of the Municipalities Act

The defendants contended *inter alia* that the plaintiff had no right to sue, that the suit was barred under section 167 of the Bombay District Municipalities Act, and article 36 of the Limitation Act, and that the rules imposing upon the Managing Committee or its Chairman the duty of checking the accounts or controlling the Secretary were *ultra vires*

The District Judge held that the suit was not barred under article 36 of the Limitation Act or section 167 of the Municipalities Act, that the rules were not *ultra vires* that the defendants Nos 1 and 2 had misappropriated the amount in suit, and that the misappropriation was facilitated by the gross neglect of duty by defendants Nos 3 to 12 The learned Judge further held that the plaintiff was entitled to bring the suit, on the following grounds —

To clear the way it may be said that there is no evidence at all that the corporator defendants or any of them were at all accomplices in the frauds perpetrated by defendants Nos 1 and 2.

The suit as regards the corporator-defendants is brought under section 42 of the Municipal Act which renders every Councillor liable personally for the misapplication of any fund which shall have been facilitated by gross neglect of his duty as a Councillor

I find that the corporator-defendants were bound to exercise the powers conferred on them by the rules that they and in particular defendant No. 8 the chairman and defendant No 6 the acting chairman and defendants Nos. 4 5 and 10 the auditors from time to time did entirely neglect to perform their duties under the rules and I find that such neglect was very gross and I find that if such neglect had not been these frauds would probably not have been committed, or if committed, would have been earlier detected and brought to

the notice of the general body and that recovery might have been made which is now impossible

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As regards the title given by section 42 the affair is as it was but as regards the section 179 and the rights conferred thereunder matters have much changed The suit is of a two fold nature against the servants of the Municipality and against individual corporators The suit against individual corporators is brought under section 42 but this gives no right of suit against servants of the Municipality Government's right of suit against the servants that is against defendants Nos 1 and 2 depended on the right of the Municipality to sue its servants for malfeasance which right I hold vested in Government after the suspension of the Municipality If that suspension ends, the right again vests in the Municipality and Government ceases to possess it. The words in section 179 are during the period of suspension and there is no provision in the Act for Government's retaining any of the property which had vested in the Municipality previous to suspension in its hands subsequent to reconstitution Now the Kaira Municipality has been reconstituted by order of the Government with effect from 16th August 1912 *vide* Government Resolution No 3580 of 1st June 1912

I think then that Government cannot get a decree against defendants Nos 1 and 2 though as a fact I have found that these defendants were guilty of embezzlements laid.

Accordingly, the suit was decreed only against defendants Nos 3 to 12

Defendants Nos 3 to 12 appealed to the High Court

G N Thakor, for the appellants —I contend that the present suit cannot lie at the instance of Government The liability is sought to be fixed under section 42 of the Bombay District Municipalities Act, (Bombay Act III of 1901) The section makes every Councillor liable "for the misapplication of any fund," under certain conditions The Councillor can be sued for the recovery of moneys "so misapplied" The terms "misapplication" and "misapplied" are not defined; but sections 51 and 52 indicate how Municipal property and funds are to be applied Any application of the funds contrary to or inconsistent with the purposes of the Act would be a

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misapplication. "Misapplication necessarily implies application. If that 'application' is wrongful, or illegal, or unlawful, or unauthorized, it becomes a 'misapplication.' There must be a conscious application of the fund which must turn out to be wrongful or unauthorized. Theft by a servant or clerk or Secretary from the Municipal safe could be no application of the fund, and, therefore not a misapplication. The thief may not apply the money to any purpose at all. The clerk or servant either steals or misappropriates the moneys. Misapplication as used in the section is different from misappropriation. An individual Councillor committing or abetting the commission of theft or criminal breach of trust misappropriates but does not misapply. The body of Councillors voting Municipal funds for the *wadi* belonging to a caste or for an object not contemplated or authorized by the Act can be said to 'misapply' the funds. See *Reg.* v. *Mayor of Norwich*[1], *Attorney-General* v. *West Ham Corporation*[2], and *Vaman* v. *Municipality of Sholapur*[3], statute 45 & 46 Vic. c. 50, sections 117 and 124. The meanings of the term as given in Webster's Dictionary support my contention "to apply wrongly", "to use for a wrong purpose" and "to misapply public money".

Bahadurji (acting Advocate General) with *S. S. Patkar*, Government Pleader, for the Secretary of State (respondent No. 1):—The wording of section 42 is to be construed in reference to the object and the purpose for which the section was enacted. Section 50, clause (2) renders the Councillors express trustees, and the Municipal property and funds are to be held and applied by them as such trustees. Their liability as

(1) (1882) 30 W. R. 752 (Eng.). (2) [1910] 2 Ch. 560.

(3) (1897) 22 Bom. 646.

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trustees is not confined to acts done by them alone As such trustees they are liable for any acts or omissions on their part which are in the nature of breach of trust Gross neglect will render them liable if it results in any loss to the Municipality The public in their ignorance cannot be trusted to sue the Councillors for neglect of duty or breaches of their obligations as trustees Section 42 has therefore been enacted to protect the public against the consequences of neglect of duty on the part of the Councillors In view of this object, the word 'misapplication' was used deliberately to cover and include misapplication or misappropriation by others The latter part of the sub clause shows that the Councillors need not be parties to such misapplication Any misapplication which shall have happened through, or been facilitated by, Councillors' gross neglect will render them liable to a suit See *Parr* v *The Attorney-General*,[1] *Attorney-General* v *The Corporation of Lichfield*[2] *The Attorney-General* v *Aspinall*[3] The word 'misapplication' is used in its broadest sense see Murray's Dictionary and *The Attorney-General* v *The Corporation of Leicester*[4] The Councillors defendants being trustees they are liable for any kind of misappropriation which is occasioned by their neglect The latter part of the section gives the right of suit to the Government

Thakor, in reply —The cases cited have no bearing Councillors are constituted as trustees by section 50 Their liability under the general law was sufficient and no section was needed to define their liability as trustees But it was thought necessary to vest the right to sue in Government as regards particular kinds of breaches of trust These kinds have been restricted

(1) (1842) 8 C & F 409 (2) (1848) 11 Beav 120
(3) (1837) 2 My & C 613 (4) (1844) 7 Beav 176

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to a wrongful application of Municipal funds by the Councillors as a body The defendants are not sued as Councillors, but as members of the Managing Committee Section 42 does not apply to them

Further, the suit is time-barred Article 36, and not article 149, of the Second Schedule of the Indian Limitation Act, applies See *Srinivasa Ayyangar* v *Municipal Council of Karur*[1] and *Sivachidambara Mudaliar* v *Kamatchi Ammal*[2] Even if section 42 applies, the Government has instituted the suit on behalf of the Municipality The right of the Municipality to bring the suit was barred under section 36 and a suit by Government cannot get over the bar *The King* v *Morrall*[3] See also *Gunga Gobind Mundul* v *The Collector of the 24 Pergunnahs*[4], and *Pullanappally Sankaran Nambudri* v *Vittil Thalakat Muhamod*[5]

Next, the rules of the Municipality were *ultra vires* They were framed under the old Municipal Act, and are inconsistent with the present Municipal Act

T R Desai, for the heirs of appellant No 3—The liability of appellant No 3 who was the auditor of the Municipality, being in tort, ceased at his death His estate in the hands of his heirs is not liable, *Chunilal* v *Secretary of State*,[6] *Phillips* v *Homfray*[7], *United Collieries, Limited* v *Simpson*[8] and Broom's Legal Maxims, p 183 The Court can take notice of events that have happened pending the appeal: *Rustomji* v *Sheth Purshotamdas*[9] Even if the suit does not abate against the heirs, the judgment should make it clear

(1) (1899) 22 Mad 342
(2) (1909) 33 Mad. 71
(3) (1818) 6 Price 24
(4) (1867) 7 W R 21 P C
(5) (1905) 28 Mad. 505
(6) (1910) 35 Bom. 12
(7) (1883) 24 Ch. D 439
(8) [1909] A. C 383 at p. 391
(9) (1901) 25 Bom 606

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that the ancestral estate in the hands of the sons is not now liable under the decree

Bahadurji—The suit having already culminated into a decree, it cannot abate on account of the death of appellant No 3 See *Gopal v Ramchandra*[1] and *Paramen Chetty v Sundararaja Naick*[2]

H V Divatia for respondent No 2

BATCHELOR J —This was a suit filed by the Secretary of State for India in Council against twelve defendants The 1st defendant was the Secretary and the 2nd defendant was the accounts clerk of the Kaira Municipality The other defendants were Councillors of that Municipality The relief claimed was the recovery from the defendants of certain sums of money said to have been embezzled from the Municipality by the defendants Nos 1 and 2

The learned District Judge of Ahmedabad gave the plaintiff a decree against the defendant-Councillors, but upon a technical ground refused to grant a decree against the Secretary and the accounts clerk though he held them guilty of the embezzlements imputed to them The present appeal is brought by the Municipal Councillors

The first point taken by the learned pleader for the appellants was by way of demurrer to the suit it being contended that the plaintiff was not entitled to sue even on the facts as stated in the plaint Now, the plaintiff's title to sue was by him based upon section 42 of the District Municipalities Act of 1901 and the question between the parties on this point is solely whether section 42 of the Act is applicable on the state of facts alleged in the plaint That state of facts is that three sums of money belonging to the Municipal fund

(1) (1902) 26 Bom 597 (2) (1902) 26 Mad 499

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were embezzled by the 1st and 2nd defendants, paid servants of the Municipality, and that these embezzlements were facilitated by the appellant-Councillors' gross negligence of their duties as such Councillors It is argued for the appellants that even upon those facts section 42 is not applicable to the suit inasmuch as the embezzlements by paid servants of the Municipality would not amount to misapplication of the Municipal funds within the meaning of the section I was at first impressed by this argument, but on further consideration it seems to me that it ought not to prevail

Mr Thakor was able to make a plausible case for his contention by fastening upon the word 'misapplication' apart from its context, and by insisting that the strict etymological meaning should be ascribed to the word In my opinion, however, the true meaning of the section is not to be arrived at in this way, but by a due consideration of its provisions as a whole Now, the first paragraph of the section with which alone we are concerned runs as follows

Every Councillor shall be personally liable for the misapplication of any fund to which he shall have been a party or which shall have happened through or been facilitated by gross neglect of his duty as a Councillor and may be sued for recovery of the moneys so misapplied as if such moneys had been the property of Government

Now Mr Thakor's argument is that the mischief struck at by the section cannot extend beyond the case where the fund of the Municipality has been applied by the Councillors, or some of them, for purposes not authorized by section 52 and the following sections of the Act It is said that misapplication must mean only a wrongful or unlawful application, and that the word therefore looks only to the object to which the funds of the Municipality are devoted Reference was made to the case of *Reg* v *Mayor of Norwich*[1]

[1] (1882) 30 W R (Eng) 752

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But if we turn to the words of the section, the first thing to be noticed is that there is no condition as to the person or persons by whom the misapplication contemplated must have been made, and it seems to me that this omission was deliberate It cannot, therefore, be said that the operation of the section is restricted to misapplications made by any Councillor or Councillors So long as any misapplication has been made by whom soever it may have been made the section comes into play To ascertain the precise scope of the word 'misapplication as here used, it seems to me material to refer to the provisions of section 50, sub-section 2 and section 51 of the Act which make it clear that the position of the Councillors in regard to the Municipal fund is in law that of trustees, and their liabilities, *therefore, must be determined upon this footing* As trustees there can be no doubt that they would be bound to exercise over the trust property the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property And though the Trusts Act would not perhaps strictly apply, yet there is no reason to doubt that the principle embodied in section 15 of that Act would govern the position of the present appellants As trustees, therefore, it seems to me that they would be liable for any loss of the trust fund which was facilitated by the gross neglect of their duties as trustees, and upon this footing their liability would be the same whether the loss was caused by an act free from moral turpitude or by a crime That being so, the first words of section 42 down to the word 'as a Councillor' should, I think, be read as enacting merely the ordinary provisions of the law The addition of the words entitling the Government to sue may well be explained by reference to the notorious apathy of Indian mofussil rate-payers to move in cases where public moneys have been misappropriated or embezzled

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Now, in the case before us on the facts stated in the plaint, the Secretary and the accounts clerk had control of these Municipal funds in order that they should hold them in a particular way, that is, I think, in order that they should apply them in a particular way By embezzling the money, as it seems to me, they misapplied it, because they used it for purposes other than those for which it was entrusted to them There was a diversion of the Municipal funds to an unlawful purpose, and that, I think was enough to constitute a misapplication of the funds within the meaning of the section I think that the context in which the word 'misapplication' occurs indicates that the word is employed rather in the broad and popular sense than in the narrow or etymological sense As I have said, there is no requirement that the misapplication must be by the Councillors themselves or by any specified persons whatsoever, and the use of the passive word happened seems to me to suggest also that the scope of the section extends to a misappropriation of the Municipal funds by a Municipal employee, provided only that the misappropriation was facilitated by the Councillors' gross neglect of their duties And the same conclusion is suggested by the addition of the words extending the liability of the Councillors to cases where they have not been parties to the misapplication but have merely facilitated it by gross neglect of their duties

I think there is force too in the learned *District* Judge's argument that one object of the section seems to have been to bring home to the consciences of the Municipal Councillors that their position entails duties as well as dignities

On these grounds I am of opinion that the suit on the facts alleged was properly brought by the plaintiff and

that this first point taken for the appellants fails That being so it becomes unnecessary to consider certain subsidiary arguments which might arise as to the applicability of section 179 of the Act if the appellants contention under section 42 had been upheld

I pass therefore to what Mr Thakor said in regard to the merits And here I propose to be designedly short, because with great respect to the somewhat protracted argument which we have listened to, it seems to me that the appellants' case can, without injustice be treated in a very summary manner

Mr Thakor urged that the suit was barred by limitation, because it fell under article 36 of the Limitation Act My answer to that is that the suit does not fall under that article, but being, not only in name but in substance a suit by the Secretary of State for India, it falls under article 149 Then it was said that since the embezzlement occurred in the period between December 1903 and February 1904, the cause of action accruing to the Municipality became extinct when the Municipality was suspended or superseded in 1909, and, therefore, there was no cause of action which the Secretary of State could inherit as the successor-in-title of the Municipality It appears to me however, that the answer to this argument is supplied by section 42 of the District Municipalities Act If I am right in thinking that the suit properly fell under that section, then it is not exposed to any bar of limitation For, as soon as these defalcations were committed in 1903-1904, the then Councillors became under the section liable to be sued at the hands of the Secretary of State within a period of sixty years

As Mr Thakor in the course of his argument gave little or no attention to the consideration of what are the substantial merits or demerits of the appeal, I think

it necessary to say that paragraph 7 of the plaint recites the various instances of gross misconduct which were imputed to the Councillor-appellants, and that we heard nothing from Mr Thakor which would enable us to say that these acts or omissions constituting grave misconduct were not committed by the Councillors

The next point taken, however, was that even though these acts and omissions of grave misconduct were properly imputable to the Councillors, yet they were entitled to be absolved of the consequences inasmuch as the rules made by the Municipality under the old Act and imposing certain duties upon these Councillors were *ultra vires* of the authority making them It was not contended that the rules were *ultra vires* when referred to the old Act, that is to say, to section 32 of the Act of 1884 But it was contended that the rules were beyond the powers which are conferred by the present Act of 1901 That argument however, seems to me to receive a sufficient answer in section 2 of the present Act which expressly saves rules made under the preceding enactment As to section 46 of the present Act to which Mr Thakor made appeal, that section clearly cannot now be invoked, because the conditions of its operation do not exist Those conditions do not exist, because, admittedly, this Kaira Municipality has not made or altered or rescinded any rules under the Act of 1901 The rules made under the Act of 1884 are, as I have said, saved by section 2 of the Act of 1901 And Mr Thakor's complaint that those rules cast too heavy a burden on the Managing Committee receives no countenance from the Act of 1901 of which section 27 practically devolves upon the Managing Committee the exercise of all the powers of the Municipality Then it was urged that the rules themselves were unworkable or were obsolete But it became clear, after very slight discussion, that the only

meaning in these points was that no serious attempt had ever been made to carry those rules into practice Then Mr Thakor laboured to show that admitting the embezzlements it could not be said that they were caused by his clients' gross negligence But the Act does not require that the misapplication shall have been caused by the gross negligence of the Councillors It requires only that the gross negligence of the Councillors shall have facilitated the misapplication and to my mind it is unarguable that that is not the case here For the evidence shows that there was in this mofussil Municipality an entire absence of any sort of real supervision or control so that in fact it was left to the unchecked Secretary and clerks to deal with the funds as they chose The way they chose to deal with *them was the way of fraud and embezzlement* and it seems to me certain that these frauds were rendered easy that is to say, facilitated by the absence of check or supervision which these Municipal servants enjoyed This conclusion I think is not disturbed by the circumstance that other causes also contributed, as for instance the absence of auditors and the slackness and inaction of the official president I think it fair to say in justice to these Councillors, though in law it is neither excuse nor palliation, that probably they were no more inactive than the majority of mofussil Councillors usually are so that I do not, for one moment wish to impute to them any special or extraordinary remissness in the execution of their duties What I do find proved is that like very many gentlemen in the mofussil placed in similar positions they failed to realize the character of the duties which were in law imposed upon them They are certainly free from any sort of fraud or moral turpitude and their case is unfortunate in this way that they who were probably no more guilty than many others have had the misfortune

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to have their obligations brought home to them so roughly However that may be, the liability is imposed by the Statute and must in a suitable case such as this be enforced

The only other point taken by Mr Thakor was a faint attempt to dispute that the third sum mentioned in the plaint, viz, Rs 425 was in fact embezzled No attempt either was, or could be, made to suggest that the other two sums, viz, the Rs 200 and Rs 81-13-0, were not embezzled The misappropriation of these two sums was proved mainly by the evidence of the witness Yasin, and it is upon Yasin's evidence also that the alleged embezzlement of the Rs 425 mainly depends Yasin, who must admittedly be believed in regard to the other two items may, I think, be safely believed in regard also to the third item And this is especially the case seeing that he was believed by the learned Judge who heard and saw him I may add that no attempt was made by the defence to displace the evidence of Yasin by calling evidence to prove that the enormous mass of *kanlai* to which these payments in the books were ascribed was ever in fact commanded or received by the Municipality

On behalf of the heirs of appellant No 7, who was the 10th defendant in the Court below, Mr T R Desai has taken the point that since the 10th defendant died after the decree of the lower Court, that circumstance should alter the character of our judgment affirming the lower Court's decree The learned pleader, however, has not been able to satisfy us that any such consequence should ensue, and the case of *Paramen Chetty v Sundararaja Naick*[1] is against his contention It appears to me that the only point which we have to consider in this connection is whether the decree made against the 10th

[1] (1902) 26 Mad 499

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defendant should be affirmed We are of opinion that it should be affirmed and what the consequences of that affirmation will be to the heirs of the 10th defendant is a matter which is not for decision by us now, but may be left for decision later

I have now noticed all the points which have been urged in this appeal and in my opinion for the reasons stated, the appeal fails and should be dismissed with costs

The cross objections are also dismissed with costs

The other connected appeals, Nos 19, 20 and 22 of 1913 are also dismissed with costs for the same reasons, and the cross-objections in them are similarly dismissed with costs

HAYWARD J —The Secretary of State sued to recover three sums alleged to have been misappropriated in the years 1903-1904 by the defendant No 1, the Secretary, and the defendant No 2, the accounts clerk, through the gross negligence of defendants Nos 3 to 12, the Councillors on the Managing Committee of the Kaira Municipality

The District Judge held that the suit though rightly framed against the defendants Nos 1 and 2 during the supersession of the Municipality, could not be continued against them in that form after the re establishment of the Municipality He held, however, that the suit could and ought to be decreed against the defendants Nos 3 to 12 by reason of the provisions of section 42 of the Bombay District Municipalities Act of 1901

This first appeal has been brought by defendants Nos 3 to 7 and 9 to 12 It has not been disputed on their behalf that the first two items of Rs 200 and Rs 81 were as a matter of fact, misappropriated respectively at the end of 1903 and the beginning of 1904, but it has been urged

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[1](1903) 26 Mad 499

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[1] (1902) 26 Mad 499

of men who were *bona fide* bent on working them Nor could they be said to have been obsolete For, they were on rare occasions observed as pointed out by the learned District Judge Nor, in my opinion, can they be held to have been *ultra vires* The duties imposed by them were admittedly duties which could be delegated under section 27, sub section 10 of the old Act of 1884, and it seems to me that the delegation was, as a matter of fact effected by the mere passing of the rules, whether or no it could be argued that the rules were not rules regulating delegation within the meaning of section 32, clause (*a*) of the old Act of 1884 If the rules were valid rules under the old Act, they were saved from repeal by section 2 clause 1 (*b*) of the new Act of 1901 They would not appear to be inconsistent with any provisions of the new Act, for even wider duties than those delegated have been declared vested in the Managing Committee by section 27 of the new Act, and they have not been abrogated by new rules framed under section 46 of the new Act

It has also been argued that the claim was time-barred It was urged that the misappropriation occurred in 1903-04, and the amount could not be recovered by suit filed in 1910, beyond the period prescribed by article 36 of the Schedule to the Indian Limitation Act Now it might have been open to argument that the suit was barred under that article, had the suit been one by the Municipality But this suit was not brought by the Municipality Nor was it brought on behalf of the Municipality It was brought by the Government under a special right vested in the Government by section 42 of the District Municipal Act of 1901 It appears to me, therefore, that the suit was clearly within time under the provisions of article 149 of the Schedule to the Limitation Act

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that the misappropriation of the third item of Rs 425 has not been duly established That item is entered in the accounts as having been paid for *kankar* required for road mending and was supported by a receipt alleged to have been signed by a contractor named Yasin There was no evidence of delivery of the *kankar* and the contractor denied payment of the money to him and his signature on the receipt The denials of the contractor were believed No good reason has been given, in my opinion, for coming to a different conclusion from that arrived at by the learned District Judge

It has been argued, however, that the misappropriation of the three items was not facilitated, as alleged, by the admitted non observance of the rules which *required the defendant-Councillors, among other things,* periodically to count the cash, examine the accounts and control the amount of the cash kept in hand by the Secretary and to satisfy themselves that proper security was given by the Secretary It appears to me that *prima facie* the neglect of such duties would necessarily facilitate misappropriation by the Secretary and that the persistent neglect of such duties, specifically prescribed could not be held to be other than gross neglect of duties within the meaning of section 42 of *the Act It is no answer whatever to say that other* checks upon the dealings of the Secretary were neglected by other persons, such as the appointment of proper auditors by the general body and general control by the President of the Municipality

It has further, been argued that the rules did not admit of observance as they were in themselves unworkable, obsolete and *ultra vires* It may be conceded that the rules were badly drafted, but they were certainly not, in my opinion unworkable by any body

purposes of the Act by sections 50 to 52 Those purposes would appear to be public purposes obligatory or discretionary and have been specified in sections 54 to 56 of the Act The Councillors have thus been placed in the position of public trustees, and would, therefore, be liable under the ordinary law for any misapplication whether by their own acts or by any other agency through their neglect, of the property of the Municipality Reference for this proposition may be had to Lewin on Trusts (12th Edition, Chapter XIV, section 2, page 327) The Councillors have been reminded of that liability by the section under discussion and the only modification possibly intended would appear to be in the specification of the neglect contemplated as gross neglect That modification even if intended would not, however, affect the present case as the neglect here admitted would clearly be gross neglect even according to those authorities who recognise such a classification of neglect But it would appear in any case to have been desirable to provide for the enforcement of that liability No doubt tax payers would be entitled to enforce it as indicated in the case of *Vaman v Municipality of Sholapur*[1] It would, however, be unlikely that sufficiently well-to do and public spirited tax payers would be found outside the ranks of the Councillors to undertake this unpleasant duty in small mofussil Municipalities, and it might be doubted whether any alternative and effective remedy would be found in the provisions of sections 92 and 93 of the Civil Procedure Code Hence it would appear that it was considered desirable to confer the necessary powers by this particular section 42 of the Act of 1901 on the Government

It was lastly urged that as the defendant No 10 died after decree it would be necessary to determine here

[1] (1897) 22 Bom 646

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But the main contention in this appeal has been whether the misappropriation by defendants Nos 1 and 2 could be held to be 'misapplication' within the meaning of section 42 of the District Municipal Act of 1901 It has been argued that misappropriation could not be called 'misapplication in ordinary language and that the word misapplication' as introduced into the section contemplated only misapplication of funds by official acts of the Councillors to public objects not permitted by sections 54 to 56 of the Act Now it seems to me that if a man, entrusted with moneys for a particular purpose, applies or converts those moneys to his own use either by depositing them in his own cash-box or by spending them on himself, he could correctly be said, in ordinary language, either to have misappropriated or misapplied those moneys The result of his misappropriation was the 'misapplication' of those funds Any diversion of funds however caused from their proper purposes would be covered by the wide term misapplication' and it is in that wide sense that the term has in my opinion, been introduced into section 42 of the Act It has purposely not been restricted to a 'misapplication to which a Councillor shall have been a party,' but has been applied expressly to a 'misapplication which shall have happened through or been facilitated by gross neglect of duty by a Councillor,' that is to say, which has happened by any other agency through the gross neglect of a Councillor It would appear therefore, to have been introduced in its ordinary wide sense upon a consideration alone of the construction of the section This conclusion is in my opinion confirmed by a consideration of the objects aimed at by the section It will be observed that the Councillors constituting the Municipality under sections 9 and 10 have been declared trustees for the application of the property of the Municipality for the

attached from the applicant. The accused was convicted of criminal breach of trust of the currency note which belonged to Government and the note was ordered to be delivered to the Crown The applicant having applied —

Held that as property in a currency note passed by mere delivery the applicant had obtained a good title to the note notwithstanding that the accused had no title

The Collector of Salem [1] and *Empress v Joggessur Mochi* [2] followed

Orders under section 517 of the Criminal Procedure Code (Act V of 1898) are discretionary but the discretion is open to correction where it has been exercised in violation of accepted judicial principles

THIS was an application from an order passed by G R Khairaz Fourth Presidency Magistrate of Bombay

The accused Peter George was the Judicial Clerk in the Court of the Second Presidency Magistrate of Bombay In his official capacity he came into possession of property which consisted of Government currency notes and cash He abstracted nine currency notes of the value of Rs 100 each

The accused purchased gold ornaments from a goldsmith and tendered in payment one of the one hundred rupees notes which he had stolen The gold smith had not sufficient money to cash the note He accordingly took it to a neighbouring shop keeper (applicant) who cashed it in good faith

In the course of the investigation against the accused the note was attached by the Police from the custody of the applicant The accused was duly convicted and sentenced The trying Magistrate however, ordered the currency note to be delivered to the Crown

The applicant applied to the High Court against the order as to disposal of property

[1] (1873) 7 Mad H C R 233 [2] (1878) 3 Cal 379

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the liability of his heirs It appears to me that the only question to be determined here is whether defendant No 10 was rightly made liable by the decree The position of his heirs under that liability would be a matter for consideration in execution It is not, in my opinion, a matter for decision on appeal from the decree This would appear to be the view taken in the case of *Paramen Chetty* v *Sundararaja Naick* [1]

It is not necessary in view of my conclusions on the foregoing points to consider the argument addressed to us upon the application of section 179 of the Bombay District Municipalities Act of 1901 and the question of the substitution of the Municipality under Order XXII, Rule 10, as a party in place of the Government

The learned District Judge s decree ought, therefore, in my opinion, to be confirmed and this appeal to be dismissed with costs

Appeal dismissed

R R

CRIMINAL REVISION

1915 *September* 1

Before Mr Justice Batchelor and Mr Justice Hayward

IN RE PANDHARINATH PUNDLIK REVANKAR *

Criminal Procedure Code (Act V of 1898) section 517—Order as regards disposal of property—Discretion in making orders to be judicially exercised—Currency note—Property passes by delivery

The accused stole a currency note which he offered to a goldsmith a price for gold ornaments purchased by him The goldsmith not having had sufficient cash got the note cashed by a neighbouring shop keeper (applicant) who cashed it in good faith At the trial of the accused the note was

[1] (1902) 26 Mad 499

* Criminal Application for Revision No 214 of 1915

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IN RE PANDHARINATH PUNDLIK

attached from the applicant. The accused was convicted of criminal breach of trust of the currency note which belonged to Government and the note was ordered to be delivered to the Crown. The applicant having applied —

Held that as property in a currency note passed by mere delivery the applicant had obtained a good title to the note notwithstanding that the accused had no title

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[1] (1873) 7 Mad H C R 233 [2] (1878) 3 Cal 379

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IN RE PANDHARINATH PUNDLIK

A A Pais, for the applicant

S S Patkar, Government Pleader, for the Crown

BATCHELOR, J —This is an application for revision of an order passed under section 517 of the Criminal Procedure Code by the learned Fourth Presidency Magistrate who convicted one Peter George of criminal breach of trust in respect of a bundle of currency notes and ordered that one of the notes now in dispute should be returned to the Crown, the notes having been misappropriated from the Presidency Magistrate's Court The note now in dispute had been transferred to the possession of the present petitioner in this way Peter George made a purchase from a neighbouring jeweller and tendered in payment the Rs 100 note The neighbouring jeweller was unable to cash the note at the moment, and therefore took it over to the present petitioner who supplied the cash There is no allegation of any bad faith or fraud on the part of the present petitioner That being so it seems to us a case for the application of the general rule that property in a currency note passes by mere delivery see the case of *The Collector of Salem*[1] and *Empress* v *Joggessur Mochi*[2] The petitioner consequently obtained a good title to the note, notwithstanding that Peter George had no title The order under discussion is, therefore in our opinion, unsustainable It is true that orders under section 517 of the Criminal Procedure Code are discretionary, but the discretion is open to correction where as here it has been exercised in violation of accepted judicial principles

We, therefore, set aside the order and direct that the currency note be returned to the petitioner

Order set aside

R R

(1) (1873) 7 Mad H C R 233

(2) (1878) 3 Cal 379

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

PIRAPPA BIN MALKAPPA AND ANOTHER (ORIGINAL DEFENDANTS) APPELLANTS v ANNAJI APPAJI MOHOLKAR (ORIGINAL PLAINTIFF) RESPONDENT * 1915 September 1

Dekkhan Agriculturists Relief Act (XVII of 1879) section 72†—Agriculturist—Status at the time when the cause of action arises—Sons of original debtor not in existence at the date of the cause of action are yet within the statute— Person meaning of

The defendants father passed a registered bond to the plaintiff in 1900 the cause of action under which accrued in 1901 In 1912 the plaintiff filed a suit to recover moneys due under the bond and tried to bring his claim in time by reference to the provisions of section 72 of the Dekkhan Agriculturists Relief Act (XVII of 1879) The defendants contended that the section did not apply for at the time the cause of action arose in 1901 they were not only not agriculturists but were not in existence at all The lower Court negatived the contention and decreed the suit The defendants having appealed—

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* Second appeal No 232 of 1914

The section runs as follows —

† In any suit [of the description mentioned in sec 3 cl (w)] for the recovery of money from a person**** who at the time when the cause of action arose was an agriculturist [in any of the districts of Poona Satara Sholapur and Ahmednagar] the following periods of limitation shall be deemed to be substituted for those prescribed in the second column of the second schedule annexed to the Indian Limitation Act 1877 (that is to say) —

(a) When such suit is founded on a written instrument registered under this Act on any law in force at the date of the execution of such instrument—twelve years

(b) in any other case —six years

1 Provided that nothing in this section shall—

(i) apply to a suit for the recovery of money from a person who is a surety merely of the principal debtor if the principal debtor was not at the time when the cause of action arose an agriculturist [in any of the districts aforesaid] or

(ii) revive the right to bring any suit which would have been barred by limitation if it had been instituted immediately before this Act comes into force

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APPAJI

Held that the suit fell within the scope of section 72 of the Dekkhan Agriculturists Relief Act and that the plaintiff was entitled to the extended limitation

The word "person" in section 72 of the Dekkhan Agriculturists Relief Act (XVII of 1879) is equivalent to the word "defendant" which occurs in section 3 cl (w) of the Act

SECOND appeal from the decision of G K. Kanekar, First Class Subordinate Judge with Appellate Powers, reversing the decree passed by G L Dhekne, Joint Subordinate Judge at Sholapur

Suit on a bond

On the 19th June 1900 the defendants' father passed to the plaintiff a registered bond for Rs 600 The moneys became due in 1901

The plaintiff filed the present suit on the 6th June 1912 to recover moneys due under the bond The claim was sought to be brought in time by reference to the provisions of section 72 of the Dekkhan Agriculturists' Relief Act, 1879

The defendants contended *inter alia* that the claim was barred by limitation for they were not only not agriculturists in *1901* when the cause of action accrued, but they were not even born at that date

The Subordinate Judge dismissed the suit as barred by limitation

On appeal this decree was reversed by the lower appellate Court where it was held that the claim was not barred by limitation for reasons which were expressed as follows —

The object of section 72 aforesaid when it was first introduced in Act XVII of 1879 was to obviate the difficulties of the rayat which were aggravated by the Indian Limitation Act of 1877 The money lender was compelled under the Limitation Act of 1877 to sue the rayat at short intervals or to take a fresh bond from him In section 72 aforesaid when it was first introduced the words were as follows — In any suit against an agriculturist

or the recovery of money That section was amended by Act XXIII f 1881 to prevent anomalous re ults ari ing from the wording of section 72 bove quoted That wording showed that defendant who had become an griculturi t shortly before the institution of the suit is contemplated by that ection To prevent such anomalous re ults the wording above quot d was leleted and that section was amended so that it will apply only when the lefendant was an agriculturist at the time the cause of action arose The expression suits under this Act at the beginning of section 72 was deemed o be objectionable The words suits of the description mentioned in section 3 cl. (w) were sub tituted by Act No XXIII of 1886 The history of section 72 afore aid as stated above would show that appellant s ground No 8 in his memorandum of appeal and the argument of his pleader ba ed on section 3 cl (w) of the Dekkhan Agriculturists Relief Act of 1879 and on the reference of that ection in section 72 aforesaid and on the word defendant as defined in section 2 of the Indian Limitation Act of 1908 are weighty and convincing It must be noted that section 72 does not state that the suit of the description mentioned in ection 3 cl (w) must be against the per on who at the time when the cause of action arose was an agriculturist That section provides for the recovery of money from such person That section requires that the person who is liable to be sued must be an agriculturist when the cause of action arose It does not contemplate that the suit must be in tituted against the person who was an agriculturist when the cause of action arose Section 3 cl (w) aforesaid militates against such view A statute ought to be construed so that if it can be prevented no clause section or word shall be superfluous void or insignificant Generally an Act must be so construed as to advance the objects as contemplated by the Legislature The interpretation of section 72 as made by the lower Court is not consistent with the history of section 72 aforesaid from its introduction at the outset down to the present amendment of that section The word defendant in section 3 cl (w) and the word person in section 72 aforesaid appear to be convertible The Legislature appear to have used those words having regard to the d finition of defendant in section 3 of the Indian Limitation Act of 1877 or section 2 of the Indian Limitation Act of 1908

The lower Court observes in its reasoning for its finding on the issue of limitation at the end as follows — But the Legislature has probably used the word person advisedly so as to exclude the benefit of section 3 in certain suits such as the one before me I am unable to find any justification for the observation above quoted The object of section 72 aforesaid when it was first introduced and its subsequent amendments do not in the lea t lend countenance to the above quoted observation On the whole I hold that section 72 of the Dekkhan Agriculturists Relief Act of 1879 applies to the present case and that the lower Court ha erred in interpreting that section Exhibit 15 is

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defendant's pleading which shows that the debtor Malkappa died in the year 1909 Exhibit 18 is plaintiff's deposition He admits that he had last received payment from the said Malkappa one year before his death That payment appears to be of the amount of interest due to plaintiff Defendant's pleading Exhibit 15 and application Exhibit 19 support plaintiff's evidence in the matter The effect of that payment is also to save the bar of limitation if any under section 20 of the Limitation Act of 1908

The defendants appealed to the High Court

D A Tulzapurkar, for the appellants

P D Bhide, for the respondent

BATCHELOR J —The question raised in this appeal is one of some nicety upon the construction of section 72 of the Dekkhan Agriculturists Relief Act, a section which, as it seems to us, is somewhat unfortunately worded

The bond in suit is registered, and was executed on the 19th June 1900 Ordinarily the period of limitation would have expired in 1907, that is, six years from the accrual of the cause of action in 1901 The suit was not filed till 1912, but it is sought to save it by virtue of section 72 of the Dekkhan Agriculturists' Relief Act, which, if it can properly be applied, extends the period to twelve years The lower appellate Court has upheld the plaintiff's contention on this point

It is now contended by Mr Tulzapurkar for the appellants that section 72 cannot be invoked in the plaintiff's favour because the suit is brought not against the person who originally executed the bond in 1900, but against his sons It is, therefore, urged following the strict words of the section, that this suit cannot be said to be brought against a person who, at the time when the cause of action arose, was an agriculturist in the named districts For, the argument runs, the cause of action arose in 1901, and at that time the persons against whom the suit is brought were not only not agriculturists

within the named districts, but were not in existence at all That no doubt is a construction to which a rigorous adherence to the mere words of section 72 does lend some countenance, but it is not, we think, a construction which the Court ought to favour, if only out of respect for the Legislature For, if we followed that construction the result would be that a suit brought against an agriculturist father would receive the concession afforded by the section, but the concession would be refused if the suit were brought against the agriculturist sons upon the death of the father and a result so repugnant ought not lightly to be attributed to the Legislature Rather, we think, it must be taken that the word person in section 72 is equivalent to the word defendant which occurs in section 3 cl (*w*), that clause being referred to in the section

It may also be contended with less violence than Mr Tulzapurkar's argument would involve that the words 'cause of action' must be read in their proper sense as referring to the whole bundle of material facts which it is incumbent upon the plaintiff to prove in order to establish his case In such an instance as this, therefore, the cause of action as against the present defendants would be compounded partly of the fact of the execution of the bond and partly of the fact that the present defendants succeeded to the liabilities of their father on his death in 1909 In that view also the suit would fall within the scope of section 72, and plaintiff would be entitled to the extended limitation

On these grounds we think the lower appellate Court was right, and the appeal is dismissed with costs

Appeal dismissed

R R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

1915 September 1

MAHADEO RANGNATH GODBOLE (ORIGINAL PLAINTIFF) APPELLANT *v.* RAMA TUKARAM DEVKATE AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS*

Dekkhan Agriculturists Relief Act (XVII of 1879) section 22†—House of agriculturist—Exemption from sale—Exemption not confined to cases of contractual debts but extends to restitution proceedings—Civil Procedure Code (Act V of 1908) section 144

The defendants paid into a Court sum which they had to pay under a decree and at the same time preferred an appeal against the decree The sum paid into Court was taken away by the plaintiff The appeal filed by the defendants was successful the decree was reversed and the suit ordered to be retried The defendants thereupon applied under the provisions of section 144 of the Civil Procedure Code for restitution of money paid by them and prayed for an order to sell the plaintiff's house in case he failed to make the restitution The plaintiff contended that he being an agriculturist his house could not be sold by virtue of the provisions of section 22 of the

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* Second Appeal No 50 of 1915

†The section runs as follows —

22 [Immoveable property belonging to an agriculturist* * * *shall not be attached or sold] in execution of any decree or order [passed whether before or after this Act comes into force] unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates and the security still subsists [For the purposes of any such attachment or sale as aforesaid standing crops shall be deemed to be moveable property]

But the Court [on application or of its own motion] may when passing a decree against an agriculturist or [in the course of any proceedings under a decree against an agriculturist passed whether before or after this Act comes into force] direct the Collector to take possession for any period not exceeding seven years of any such property of the judgment debtor to the possession of which he is entitled and which in the opinion of the Collector is not required for his support and the support of the members of his family dependent on him and the Collector shall thereupon take possession of such property and deal with the same for the benefit of the decree holder in manner provided by section 29

The provisions of section 31 shall *mutatis mutandis* apply to any property so dealt with

Dekkhan Agriculturists' Relief Act, 1879. The lower Courts negatived the contention on the ground that the provisions of section 22 applied only in cases of contractual debts and not to restitution proceedings. The plaintiff having appealed:—

Held, that if the plaintiff was an agriculturist his house was immune from sale under section 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The true construction of section 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is first, a general provision that immoveable property belonging to an agriculturist shall always be immune from sale, and secondly, a proviso directing that this immunity is subject to exception where the two following conditions are both satisfied, that is to say, (*a*) where the decree or order in question relates to the repayment of a debt, and (*b*) where the agriculturist's property has been specifically mortgaged for the payment of that debt. The limiting words referring to a debt occur only in the proviso and cannot be imported into the main rule so as to restrict its express generality.

SECOND appeal from the decision of F. X. DeSouza, District Judge of Sholapur, confirming the order passed by R. D. Nagarkar, First Class Subordinate Judge at Sholapur.

Execution proceedings.

The decree under execution was a redemption decree. It directed the defendants to pay Rs. 550 on the 25th March 1909, and to pay the balance of Rs. 410 in annual instalments of Rs. 100 each.

The defendants accordingly paid into Court Rs. 660 which the plaintiff withdrew.

Meanwhile the defendants appealed against the decree with the result that the decree was reversed and the suit remanded for retrial on merits.

The defendants thereupon applied to the Court under section 144 of the Civil Procedure Code for restitution of the sum of Rs. 660 and prayed that on failure of the plaintiff to make the payment, the sum should be realised by sale of the plaintiff's house.

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The plaintiff contended that he being an agriculturist his house was exempt from sale by virtue of the provisions of section 22 of the Dekkhan Agriculturists' Relief Act, 1879

The Subordinate Judge did not accept the contention on the following grounds —

They seek the relief now sought not in execution of a decree or order but in pursuance of statutory provision contained in section 144 of the Civil Procedure Code To such a case section 22 of the Dekkhan Agriculturists Relief Act which is confined to the execution of a decree or order of a *Court* has no application Even assuming therefore that the plaintiff is now an agriculturist his immoveable property is not exempt from attachment for the purposes of section 144 of the Civil Procedure Code the relief wherein is not covered by section 22 of the Dekkhan Agriculturists Relief Act

The Subordinate Judge therefore declined to go into the question whether the plaintiff was an agriculturist

On appeal, the District Judge confirmed the decree on the following grounds —

The more serious objection that was pressed was based on the provisions of section 22 of the Dekkhan Agriculturists Relief Act XVII of 1879 It was contended that the order directing the recovery of the amount by sale of the immoveable property of the plaintiff was illegal as the plaintiff was in a position to prove that he was an agriculturist and under section 22 of the Dekkhan Agriculturists Relief Act immoveable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order It was vigorously urged that the Court was in error in excluding evidence adduced to prove the plaintiff's status as an agriculturist

It seems to me that this argument rests on a misconception of the scope of section 22 of the Dekkhan Agriculturists Relief Act The decree or order to which that section relates presupposes the existence of a debt and a debt *ex vi termini* connotes a contractual obligation created by voluntary agreement between the parties and not a statutory obligation such as is created by section 144 of the Civil Procedure Code Neither from the scope of the Act taken as a whole nor from the wording of section 22 does it seem to me to have been the intention of the Legislature to exempt the immoveable property of agriculturists from attachment and sale for the purpose of enforcing obligations of the latter character

The plain[illegible]

P. V. Ka[illegible]
Dekkhan Ag[illegible]
rule subje[illegible]
moveable p[illegible]
can be sold [illegible]
specifically [illegible]
There is no r[illegible]
perty is atte[illegible]
initiated under [illegible]
Code The pl[illegible]
opportunity to [illegible]

P. D. Bh[illegible]
Civil Procedure C[illegible]
and section 22 of the D[illegible]
Act must be so con[illegible]
given by statute. Section 22
the light of the provision of [illegible]
Act, which refer to debts ar[illegible]
obligation. The decree or [illegible]
section 22 must therefore be [illegible]
or debt.

BATCHELOR, J. —The appell[illegible]
original plaintiff who in 1908 b[illegible]
ment against the defendants. It [illegible]
that the plaintiff was a purch[illegible]
gagee, and the Court consequently [illegible]
a decree for redemption. The [illegible]
Rs. 960 of which Rs. 560 were [illegible]
March 1909. The balance was p[illegible]
stalments of Rs. 100. The defend[illegible]
of Rs. 660. In the meanwhile, [illegible]
lodged an appeal and the lower app[illegible]
ed and remanded the original Co[illegible]
fore on the 3rd August 1912 the [illegible]

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under section 144 of the Civil Procedure Code asking for restitution in respect of the payments which they had made, and for interest at twelve per cent There was an added prayer that in the event of the plaintiff failing to pay his house should be attached and sold

The lower Courts have ordered the sale of the plaintiff's house

The plaintiff complains that since he is an agricul turist, his house is immune from sale under section 22 of the Dekkhan Agriculturists' Relief Act If that contention is justified, then it would follow that the plaintiff must have an opportunity of proving that he is an agriculturist, such opportunity not yet having been afforded to him

The question, therefore, is whether assuming that the plaintiff is an agriculturist, his house is not liable to sale under section 22 of the Dekkhan Agriculturists' Relief Act That section, in so far as it is now material runs as follows —"Immoveable property belonging to an agriculturist shall not be attached or sold in execu tion of any decree or order unless it has been specifi cally mortgaged for the repayment of the debt to which such decree or order relates" The learned District Judge reads this section *as presupposing the existence* of a contractual debt in all cases, and he, therefore, decides that, since no such debt was in existence here the section is inapplicable The phraseology of the section does perhaps lend some colour to the District Judge's view, but it appears to us that the true reading of the section is that for which the plaintiff contends The learned Judge's construction is only to be arrived at if we read into the main general clause the restrict ive words implying the existence of a debt, and those restrictive words do not occur in the main general clause, but occur only in the limiting proviso We

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cannot, therefore, but think that the true construction of the section is first, a general provision that immoveable property belonging to an agriculturist shall always be immune from sale and, secondly, a proviso directing that this immunity is subject to exception where the two following conditions are both satisfied, that is to say, (a) where the decree or order in question relates to the repayment of a debt and (b) where the agriculturist's property has been specifically mortgaged for the repayment of that debt. The provision would have been clearer if it had been expressed at greater length but it seems that the draftsman preferred terseness and concision. Nevertheless the limiting words referring to a debt occur only in the proviso and cannot, I think, be imported into the main rule so as to restrict its express generality. This view seems to derive support both from the general character of the Dekkhan Agriculturists' Relief Act itself and from the wideness of the preceding sections 20 and 21.

We, therefore, think that the lower Court's decree must be reversed and the case must be remanded in order that the plaintiff may have an opportunity of proving that he is an agriculturist within the statute.

Costs to be costs in the Darkhast.

Decree reversed.

R. R.

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

1915 September 3

WASAPPA BIN TIMAPPA SONAGAR (ORIGINAL PLAINTIFF), APPELLANT v THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT) RESPONDENT °

Right of suit—Civil Court—Jurisdiction—Order of forfeiture passed by Magistrate—Criminal Procedure Code (Act V of 1898) sections 523 524—Disposal of property—Sale proceeds credited to Government—Suit to recover the amount

The plaintiff s house was searched in connection with a dacoity and certain property was attached on suspicion On a proclamation being issued by the 2nd Class Magistrate under section 523 (2) of the Code of Criminal Procedure 1898 the plaintiff appeared before the Magistrate to establish his claim to the property The claim was disallowed and an order was passed under section 524 of the Criminal Procedure Code for sale of the property The sale proceeds having been credited to Government the plaintiff brought a suit for the recovery of the amount The defendant pleaded that a Civil Court had no jurisdiction to entertain the suit The Assistant Judge decided the suit in plaintiff s favour The District Judge on appeal dismissed the suit holding that as under section 524 the property was at the disposal of Government Government had an absolute right to it and that the special provisions relating to investigation of claim to property mentioned in section 523 made the decision of the Magistrate final and deprived the person aggrieved of any right of action

On appeal to the High Court —

Held reversing the decree that the order of the Magistrate disposing of the property under section 524 of the Criminal Procedure Code was not final and that it did not deprive the plaintiff of his right to establish his claim in a Civil Court

Queen Empress v Tribhovan Manekchand (1) followed

Secretary of State for India in Council v [illegible] (2) dissented from

SECOND appeal against the decision of L H I[illegible]tt District Judge Dharwar reversing the decree passed by A W V[illegible] Assistant Judge at Dharwar

Suit to recover damages for trespass to goods and conversion

° Second Appeal No 6[illegible]8 of 1913

(1) (1884) 9 Bom 131

(2) (1894) 19 Bom [illegible]

Plaintiff's house was searched on the 9th July 1909 by the police of Dharwar and of the Savanur State, in connection with a dacoity which had been committed in the Savanur State and certain property was attached on suspicion.

On the 30th September 1909, the Second Class Magistrate issued a proclamation under section 523 (2) of the Code of Criminal Procedure, requiring any person having a claim to the ornaments to appear before him and establish his claim within six months. On the 17th January 1910 the plaintiff appeared to support his claim to the ornaments. The claim was disallowed, and on the 13th June 1910 an order was passed by the Sub-Divisional Magistrate under section 524 of the Criminal Procedure Code for sale of the ornaments. The sale took place accordingly and the sale proceeds were credited to Government.

The plaintiff filed the present suit on the 13th June 1911, to recover the amount of the sale proceeds (Rs. 258-12-0) from Government.

The defendant contended that the Civil Court had no jurisdiction to entertain the suit; that the claim was barred under article 2 of Schedule I of the Indian Limitation Act (IX of 1908); and that, under the provisions of section 524 of the Code of Criminal Procedure, the ornaments were at the disposal of the Government, inasmuch as the plaintiff in whose possession they were found, was unable to show that they had been legally acquired by him.

The Assistant Judge decreed the plaintiff's claim holding that the suit was maintainable in Civil Court. His reasons were as follows:—

As regards the first issue it is argued by the defendant that inasmuch as by sections 520 and 524 (2) of the Code of Criminal Procedure an appeal is

provided against orders passed under sections 517 518 519 and 524 (1) of the Code of Criminal Procedure and only in connection with section 522 of that Code is any reference made to a civil suit therefore by implication the right of initiating civil proceedings as regards orders passed under sections 517 518 519 and 524 (1) is taken away So in the case of *Secretary of State for India in Council* v *Lakhatsangji Meghrajji* (I L R 19 Bom 668) it was said (at p 672) though the Court refrained from deciding the point As section 524 allowed an appeal it is doubtful whether the law contemplates a remedy by suit But in that case the property in question had clearly been found under circumstances which created suspicion of the commission of an offence (see p 671) And it may well be that no civil suit could lie the object of which was purely the same as that which might have been attained by an appeal under section 524 (2) *But the object of this suit is different* It challenges the jurisdiction of the Magistrate to make any order at all with reference to these ornaments for it denies that the ornaments were discovered under suspicious circumstances (see paragraphs 1 and 2 of the plaint) It has not the same scope as an appeal under section 524 would have had I cannot therefore think that the right of instituting such a suit as this is taken away by anything which could be implied from Chapter 43 of the Code

Nor does the defendant s case as to the maintainability of the suit receive support from what is said in *Ramachandra* v *The Secretary of State* (I L R 12 Mad 105 at p 108) to be an established principle namely that when by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury if the mode of redressing the injury is pointed out by the statute the jurisdiction of the ordinary Courts is ousted and in case of injury the party cannot proceed by action. That principle is traced to the English case of *Stevens* v *Jeacoke* (11 Q B 731) and *West* v *Downman* (14 Ch D 111) What was said in *Stevens* v *Jeacoke* (Sic) was this It was a rule of law that an action will not lie for the infringement of a right created by statute where another specific remedy for infringement is provided by the same statute (at p 741) and in *West* v *Downman* it was said by Jessel M R (at p 120) *It is a settled rule* that if a statute creates a new right and gives a particular remedy for enforcing it there is no other remedy The present case has nothing to do with the rights created by statute So that the principle has no application here For these reasons then the first issue must be decided in the affirmative

The District Judge on appeal by the defendant, found that under section 524 of the Criminal Procedure *Code*, the property was at the disposal of the *Government* and that the special provisions relating to the investigation of claims to property mentioned in section 523 of

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the Code made the decision of the Magistrate final and deprived the person aggrieved of his right of action

He, therefore, reversed the decree and dismissed the plaintiff's suit

The plaintiff preferred a second appeal to the High Court

F R Sium for the appellant—The lower Court was wrong in holding that *the Civil Court had no jurisdiction* The decision in the case of *Secretary of State for India in Council v Vakhatsangji Meghraji*[1] does not decide the point in question and in so far as it decides the case on the merits it is in our favour The case of *Queen Empress v Tribhovan Manekchand*[2], the only authority on section 521 of the Criminal Procedure Code, is in our favour and the distinction sought to be drawn in the case of *Secretary of State for India in Council v Vakhatsangji Meghraji*[1] is unreal

The words ' at the disposal of Government ' in section 521 of the Criminal Procedure Code do not vest a title in Government and consequently cannot take away the civil remedy *see sections 88, 89 and 524 of* Criminal Procedure Code Section 88, cl (7), impliedly recognises the title of the real owner Section 89 also supports the same view

The authorities relied on in *Secretary of State for India in Council v Vakhatsangji Meghraji* [1] viz *Bulhooree Singh v The Government*[3], and *The Government of Bengal v Meer Surwar Jan*[4] are not conclusive The cases of *Queen v Chumroo Roy*[5] and *In re Chunder Bhon Singh*[6] are in our favour and have

[1] (1894) 19 Bom 669

[2] (1884) 9 Bom 131

[3] (1867) 8 W R 407 (Cr Rul)

[4] (1872) 18 W R 33 (Cr Rul)

[5] (1867) 7 W R 35 (Cr Rul)

[6] (1872) 17 W R 10 (Cr Rul)

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been followed in the cases of *Queen-Empress v Shodh Lal Rai*[1] and *Queen-Empress v Kandappa Goundan*[2]

The special remedy given under section 524, Criminal Procedure Code, is cumulative as it confirms a pre existing common law right *Lingappa Goundan v Esudasan*[3], *Belford v Hood*[4], *Mayor of Lichfield v Simpson*[5] and *Great Northern Fishing Co v Edgehill*[6]

Further when a subject has been deprived of his common law remedy he is placed in a better position than he was under the common law Applying this test we find under section 524 that—

(1) The remedy is summary

(2) The claim is often tried by a Second Class Magistrate and only one appeal is allowed

(3) No pecuniary limit placed upon his jurisdiction

The remedy is, therefore cumulative

The fact that we did not appeal from the Magistrate's order under section 524 does not deprive us of the common law remedy by suit *Pran Nath Roy v Mohesh Chandra Moitra*[7] (upheld by the Privy Council in the case of *Radha Raman Shaha v Pran Nath Roy*[8])

The case of *Ramachandra v The Secretary of State*[9] relied upon by the lower appellate Court, does not apply

S S Patkar, Government Pleader for the respondent —The cases of *Queen v Chumroo Roy*[10] and *In re Chunder Bhon Singh*[11], relied upon for the appellant, do not apply, as they deal with the claim of third parties

[1] (1894) 6 All 487
[2] (1896) 20 Mad 88
[3] (1903) 27 Mad 13
[4] (1798) 7 T R 620 at p 627
[5] (1845) 8 Q B 65
[6] (1893) 11 Q B D 225
[7] (1897) 24 Cal 546
[8] (1901) 28 Cal 47
[9] (1888) 12 Mad 105
[10] (1867) 7 W R 3 (Cr Rul)
[11] (1872) 17 W R 10 (Cr Rul)

The case of *Queen-Empress* v. *Tribhovan Manekchand*[1] refers to section 523 and the distinction drawn in the case of *Secretary of State for India in Council* v. *Vakhatsangji Meghrajji*[2] is correct.

The words "at the disposal of Government" do not vest an absolute title in Government: see sections 517 to 524 of Criminal Procedure Code. It is only section 522 which refers to a civil suit.

The Magistrate has full discretion to pass an order under section 524 and it cannot be challenged in a civil suit. We rely upon the case of *Ramachandra* v. *The Secretary of State*[3].

SCOTT, C. J. :—On the 9th of July 1909 the house of the plaintiff was searched by the police of Dharwar and of the Savanur State in connection with a dacoity which had been committed in that State, and certain property including ornaments specified in the plaint was attached on suspicion. On the 30th September 1909, the Second Class Magistrate issued a proclamation under section 523 (2) of the Code of Criminal Procedure requiring any person having a claim to the ornaments to appear and establish his claim within six months. On the 17th January 1910 the plaintiff appeared to support his claim to the ornaments. The claim was disallowed, and, on the 13th June 1910 an order was issued by the Sub-Divisional Magistrate under section 524 of the Code of Criminal Procedure for sale of the ornaments. The sale proceeds were credited to the Government.

The plaintiff brings this suit alleging that the ornaments are his property and were illegally attached, and prays that the amount realised by the sale may be awarded to him with interest. The suit was decided in the

[1] (1884) 9 Bom. 131. [2] (1894) 19 Bom. 668.
[3] (1888) 12 Mad. 105.

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plaintiff's favour, and a decree for Rs 258-12-0 was passed by Mr Varley, the Assistant Judge

The defendant, Secretary of State, appealed to the District Court which held that as under section 524 of the Criminal Procedure Code the property was at the disposal of Government, Government could do what it liked with it, and had an absolute right to it, and that the special provisions relating to investigation of claims to property mentioned in section 523 made the decision of the Magistrate final, and deprived the person aggrieved from any right of action We are of opinion that this decision cannot be supported The case referred to by the learned District Judge, viz, *Secretary of State for India in Council* v *Vakhatsangji Meghrajji* [1] did not decide or purport to decide the point In the judgment reference was made to a decision in which the point was decided, namely, *Queen Empress* v *Tribhovan Manekchand*[2] It appears to us that the distinction between a case under section 523 and one under section 524, suggested by the Judges in *Secretary of State for India in Council* v *Vakhatsangji Meghrajji*,[1] has no substance, for the order upon the claim is made under section 523, and thereafter if the claim is rejected section 524 provides that the property shall be at the disposal of Government, and then as a consequence, Magistrates are empowered to make discretionary orders for sales of such property Now in *Queen Empress* v *Tribhovan Manekchand*[2], the Court held that although the claim by two accused persons to property seized on suspicion had been decided against them under section 523, that did not deprive them of the right of suit to establish their claim

The learned District Judge relied in support of his decision upon *Ramachandra* v *The Secretary of State*[3]

(1) (1894) 19 Bom 668 (2) (1884) 9 Bom 131

(3) (1888) 12 Mad 105

But that case was properly distinguished by the learned Assistant Judge, who pointed out that the present case has nothing to do with rights created by statute, for the enforcement of which a special remedy is given We set aside the decision of the District Judge, and remand the case for disposal upon the other issues The respondent must pay the appellant's costs of this appeal

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Decree reversed and case remanded

J G R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

JHAVER HIJIBHAI (ORIGINAL DEFENDANT 2) APPELLANT v. HARIBHAI HANSJI (ORIGINAL PLAINTIFF) RESPONDENT*

1915

September 16

Bhagdari Act (Bom Act V of 1862) section 3—Will—Whether devise by will amounts to an alienation—Alienation not expressly limited to transactions inter vivos—Alienation meaning of

The devise by will of an unrecognised sub division of a *bhag* is an alienation contravening the provisions of the Bhagdari Act

SECOND appeal against the decision of Mohanrai D, First Class Subordinate Judge, A P, at Broach, confirming the decree passed by B H Desai, Subordinate Judge at Broach

Suit to recover possession

The properties in suit belonged to the *bhag* of one Bai Ganga after whose death they were inherited by Haridas Hansraj (plaintiff) and Shanker Sakhidas, the father of Bai Dahi (defendant No 1) Shankar having died, the plaintiff alleged that he was entitled to succeed to his share in preference to his daughter Dahi, who

* Second Appeal No 443 of 1914

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was excluded by custom from inheriting his *bhag* property or to his *Kothai* brother (uterine brother) Jhaver Jiji (defendant No 2), who was not an heir according to Hindu Law, and that Shankar's will in their favour being of an unrecognised sub-division was void under the Bhagdari Act

The defendants contended that the property in dispute was not originally a Bhagdari village Shankar was the owner of the disputed properties and was in independent possession thereof, and that his will was valid and operative and they were his heirs under it

The Subordinate Judge held that plaintiff was Shankar's heir in preference to his daughter or 'Kothai brother' and that Shankar's will in respect of his unrecognised sub-division was void and inoperative He, therefore, passed a decree in favour of the plaintiff awarding possession

On appeal, the District Judge confirmed the decree

The defendant No 2 preferred a second appeal to the High Court

G N Thakor, for the appellant —The only point is whether the devise by will is an alienation within the meaning of the term as used in section 3 of the Bhagdari Act, 1862 The portion devised was an unrecognised portion of a *bhag* and it was to other than a Bhagdar But the section aims at alienations *inter vivos*—during the life-time of the donor The terms "mortgage," "sale" 'lease' used in the section all contemplate that the alienation comes into effect at the time of the deed but a devise by will is not such an alienation So long as he is alive, it cannot be said that he has alienated There is no express case on the point In *Muhammad Sayeed* v *Muhammad Ismail*[1], it was

[1] (1910) 33 All. 233

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held that under section 325A of the Civil Procedure Code, 1882 a gift by a Mahomedan during last illness would operate as a will and is not an alienation falling within the prohibition contained in that section.

[SHAH J.—But that is not a case under the Bhagdari Act. The object of section 325A is different. We have to consider the aim and policy of the Bhagdari Act.]

The word 'alienation' should I submit not be construed in a wide or comprehensive sense but only *ejusdem generis* with the other words in the section which contemplate alienation during life.

T. R. Desai for the respondent was not called upon.

SCOTT, C. J.—The only point which has been seriously argued in this case is whether the lower Courts have erred in holding that the dispositions in the will amounted to an alienation contravening the provisions of the Bhagdari Act. The word "alienation" ordinarily means an act in the law by which property passes from one to another. It can pass from one to another either by transfer *inter vivos* or by testamentary devise: the words of the Bhagdari Act do not expressly limit alienations to transactions *inter vivos*, and to so limit them would be to a large extent to defeat what is well known to be the object of the Act. We, therefore, affirm the decree and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

1915 September 22

FAKIRCHAND LALLUBHAI AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS *v* NAGINCHAND KALIDAS AND OTHERS (ORIGINAL DEFENDANTS Nos 3 TO 6) RESPONDENTS [*]

Civil Procedure Code (Act V of 1908) section 11—Res Judicata—*Applicability of the principle as against co defendants*

A deposit of money in a firm was owned in equal moities by D and L In a suit brought by D in the High Court of Bombay to recover his moiety of the deposit his brother L who was a partner in the firm admitted his claim but it was contested by the other partners defendants Nos 1 and 2 Defendants Nos 3 to 6 contended that they were not partners in the firm at all The Court passed a decree against L and defendants Nos 1 and 2 The firm made losses and ceased to work L thereupon filed the present suit in the Court of the Subordinate Judge at Surat for a dissolution of the firm and for taking its accounts D was made a party to the suit as a creditor of the firm The defendants Nos 3 to 6 again contended that they were not partners in the firm A question having arisen whether the contention was *res judicata* in the present suit —

Held that the relief given to D in the earlier suit did not require or involve a decision of any case between the co defendants and therefore the co defendants were not to be bound as between each other by the Court s proceeding and decision which were necessary only to the decree which D obtained

Per BATCHELOR J — The Court is slow to enforce the principle of *res judicata* as against co defendants and the limits of the operation of the principle in such cases seem to me to be narrowly laid down

SECOND appeal from the decision of T N Sanjana, Judge of the Court of Small Causes, with Appellate Powers at Surat confirming the decree passed by B N Sanjana, Subordinate Judge at Surat

Suit for dissolution of a partnership and for taking its accounts

One Bai Samrath had deposited a sum of Rs 35,000 in the firm carried on in the name and style of Khimchand Kalidas By a deed of gift she transferred her

[*] Second Appeal No 757 of 1914

right to that amount to her two brothers, Dahyabhai and Lallubhai

Lallubhai was one of the partners in the firm of Khimchand Kalidas

Early in 1910, Dahyabhai filed a suit (No 55 of 1910) in the High Court of Bombay against the firm of Khimchand Kalidas to recover his moiety of the deposit of Rs 35,000 Lallubhai admitted the claim but his other partners (defendants Nos 1 and 2) contested it Defendants Nos 3 to 6 contended that they were not partners in the firm The Court passed a decree only against Lallubhai and defendants Nos 1 and 2

In the meanwhile the firm of Khimchand Kalidas suffered losses and ceased to work

On the 20th January 1910, Lallubhai filed the present suit in the Court of the Subordinate Judge at Surat for dissolution of the partnership and for accounts The defendants to this suit were defendants Nos 1 and 2, and defendants Nos 3 to 6 in the previous suit and Dahyabhai (defendant No 7) The defendants Nos 3 to 6 again denied that they were partners of the firm

A question then arose whether the finding in the first suit that defendants Nos 3 to 6 were not partners in the firm operated as *res judicata* in the present suit, the Subordinate Judge held that it did not, on the following grounds —

The Court held that they were not partners and dismissed the suit against them Thus not only were all the parties here also parties there—though not exactly arranged in the same way but the precise question raised here was directly and substantially in issue there and actually decided Still the one essential element to the applicability of the principle of *res judicata* viz that the question in both suits must be in issue between the same parties is absent It is not sufficient that the parties to the two suits are the same and the question in issue is the same But the question must also be in issue between the same parties In the former suit the question was in issue between the present defendant No 7 on one side and the defendants Nos 3 to 6 on the other

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The present plaintiff was not interested in the decision of that question in the previous suit except indirectly So far as his liability was concerned it was of no consequence how that question was determined As soon as the two preliminary questions of jurisdiction and limitation raised in that suit were disposed of his liability to the defendant No 7's claim stood confessed and judgment might have been immediately pronounced against him before even the question of defendants 3 to 6's liability was gone into It was not even open to him to lead evidence on the point or appeal against the finding on it Thus though the parties to the two suits are the same and the principal matter in issue is also the same yet the matter being in issue between different parties the former decision cannot operate as *res judicata* see *Bhagwant Singh v Tej Kuar* 8 All 91

On a consideration of the merits of the case, the learned Judge came to the conclusion that defendants Nos 3 to 6 were not partners in the firm He therefore, passed a decree for dissolution of partnership as between Lallubhai and defendants Nos 1 and 2, and ordered accounts to be taken

On appeal, the lower appellate Court came to the conclusion that the bar of *res judicata* applied, on the following grounds —

It is true that in that suit the plaintiff and the defendants Nos 1 to 6 in this suit were all arrayed on one side but even as between co defendants a matter may be *res judicata* But for this effect to arise there must be (*a*) a conflict of interest between the defendants and (*b*) an adjudication between the defendants necessary to give the appropriate relief to the plaintiff and (*c*) a judgment defining the real rights and obligations of the defendants *inter se* given Without necessity a judgment will not be *res judicata* amongst them by mere inference from the fact that they have been effectively defeated in resisting a claim to a share made against them as a group (11 Bom 216 25 Bom 74 18 All 65 22 All 386 29 Mad 515 30 Mad 447 and 31 Cal 95)

This being the law the first question is was there a conflict of interests between the defendants *inter se* Beyond doubt in that suit the conflict was not only between the plaintiff on one side and the defendants or some of them on the other but it was between the defendants themselves as to whether all seven of them constituted the firm of Khimchand Kalidas and were liable to the plaintiff's claim or only three of them Who were the members of that firm was a matter in issue not only between the plaintiff and the defendants in

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that suit but also between the defendants themselves The present plaintiff who was the defendant No 4 in that suit sided with his brother the plaintiff in that suit and contended that all seven constituted the firm and all seven were liable for the claim At the time this suit was pending he was as much interested as the plaintiff in that case in having the decision in his favour on the point The other defendants contended that only three of them namely the plaintiff and the defendants Nos 1 and 2 in this suit were liable and not the rest

Secondly an adjudication on this point in conflict was necessary to give the appropriate relief to the plaintiff in that case The suit was brought not against the defendants individually but against them as representing the firm of Khimchand Kalidas Without determining who constituted that firm the decree could not have been passed against any of the defendants individually In order to decide whether the plaintiff should have the decree against all seven or against three only as representing the firm it was necessary to decide as between the defendants themselves whether all seven were partners in the firm as alleged by the defendant No 4 in that suit (*i e* the plaintiff in this case) or three only as alleged by the other defendants

Thirdly a final judgment determining the real rights and obligations of the defendants *inter se* in the firm has been given by a competent Court after hearing all the parties That judgment determined not only who were liable to pay the amount sued for by the plaintiff in that case but also determined as between the defendants who were the members of the firm of Khimchand Kalidas which was admittedly liable to pay the amount I therefore hold that all three ingredients mentioned above exist in this case and the adjudication operates as *res judicata*

To hold otherwise would be to court two different judgments on one and the same point of fact between the same parties in case this Court was forced on the evidence before it to come to a different conclusion from that arrived at by the High Court in the other suit It is only when the plaintiff in the subsequent suit was only a nominal party in the prior suit that the previous judgment does not operate as *res judicata* (25 Bom 74) It was open to the present plaintiff to lead evidence in that suit to show that all seven were partners in the firm and it was open to him to appeal against the decision given in that suit All the ingredients necessary to constitute an adjudication a *res judicata* existed in this case

The decree passed by the first Court was confirmed on the above ground only

The heirs of the plaintiff Lallubhai appealed to the High Court

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FAKIRCHAND LALLUBHAI v NAGINCHAND KALIDAS

T R Desai for the appellants —The first suit was brought by a creditor of the firm of Khimchand Kalidas all persons who were alleged to be partners in the firm were made defendants It was there decided that Lallubhai and defendants Nos 1 and 2 were partners and that defendants Nos 3 to 6 were not partners In the present suit, Lallubhai who was plaintiff in the first suit is joined as defendant No 7 The parties to both suits are the same though they are differently arrayed The question for decision in the second suit is the question which was litigated in the first suit, viz, are defendants Nos 3 to 6 liable as partners We submit that the decision of the question is not barred as *res judicata*, for the finding arrived at on the point in the first suit was one as between the defendants *inter se* see *Bhagwant Singh* v *Tej Kuar*[1], *Cottingham* v *Earl of Shrewsbury*[2], *Ramchandra Narayan* v *Narayan Mahadev*[3] Further, to amount to *res judicata* there must be a conflict of interests among defendants and a judgment defining the rights and obligations of the defendants *inter se* There can be no *res judicata* by mere inference from the fact that the present plaintiff and defendants were in 1910 collectively defeated in resisting a claim made against them as a group see *Balambhat* v *Narayanbhat*[4] and *Ahmad Ali* v *Najabat Khan*[5]

G N Thakor for respondents Nos 1 and 2 —The bar of *res judicata* is clearly applicable to the present case All the requirements necessary to be complied with under section 11 of the Civil Procedure Code (Act V of 1908) are present here viz, (1) the same parties (2) a conflict of interest between defendants *inter se*, and (3) a decision on the same issue

(1) (1885) 8 All 91
(2) (1843) 3 Hare 627 at p 638
(3) (1886) 11 Bom 216 at p 219
(4) (1900) 25 Bom 74
(5) (1895) 18 All 65

The judgment in the first suit deals with the point as if raising conflict among defendants *inter se* The defence of each affects the liability of others see *Ramchandra Narayan* v *Narayan Mahadev*[1] and *Balambhat* v *Narayanbhat*[2] The case of *Bhagwant Singh* v *Tej Kuar*[3] does not apply

M D Daru for respondents Nos 3 and 4, supported respondents Nos 1 and 2

BATCHELOR J —The only question involved in this appeal is, whether Mr Justice Russell s decision in Suit No 55 of 1910 brought in this Court is now *res judicata* between the parties The learned Judge of the lower appellate Court has held that the decision is *res judicata*, and the plaintiffs appellants contend that that view is erroneous

The suit of 1910 was brought by the present plaintiffs brother, an outside creditor against the then defendants as being members of a partnership firm in which a sum of Rs 17,500 had been deposited It is admitted that that suit and the present suit were between the same parties In the earlier suit the father of the plaintiff No 1 was defendant No 4 He admitted his liability to the then plaintiff The plaintiff in that suit had contended that the present respondents were liable as members of the partnership firm which had received the deposit and the then 4th defendant now the plaintiff, admitted or contended that that was the case In other words he made common cause with the then plaintiff in asserting that the present respondents were partners in the firm The Court decided that the present respondents were not partners in the firm, and it is this decision which has been held by the lower appellate Court to act as *res judicata* in this suit

(1) (1886) 11 Bom 216 at p 219 (2) (1900) 25 Bom 74
(3) (1885) 8 All 91

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As I have indicated, the parties between whom the decision is now claimed as *res judicata* were co defendants in the earlier suit In considering whether the determination operates as *res judicata*, I think the first consideration to be borne in mind is that the Court is slow to enforce the principle of *res judicata* as against co defendants, and the limits of the operation of the principle in such cases seem to me to be narrowly laid down The leading case on the subject in Bombay is Mr Justice West's decision in the case of *Ramchandra Narayan* v *Narayan Mahadev*,[1] where the learned Judge observes "Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se* Without necessity the judgment will not be *res judicata* amongst the defendants" That exposition followed upon what was said by Vice-Chancellor Wigram in *Cottingham* v *Earl of Shrewsbury*,[2] where the Vice-Chancellor observed "If a plaintiff cannot get at his right without trying and deciding a case between co defendants, the Court will try and decide that case and the co-defendants will be bound But if the relief given to the plaintiff does not require or involve a decision of any case between co defendants the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains These pronouncements seem to me to indicate the reluctance which the Courts ordinarily feel to extending the doctrine of *res judicata* to co defendants In the

(1) (1886) 11 Bom 216 at p 220 (2) (1843) 3 Hare 627 at p 638

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case before us I am of opinion that the doctrine is not properly applicable to the co defendants In the first place I do not think that there was any real conflict of interests between the defendant No 4 and the other defendants in the Suit of 1910 It is quite true that the defendant 4 made a different case from the case made by the other defendants But that it seems to me, is not tantamount to a real conflict of interest The only interest which each of the defendants in the Suit of 1910 had was in regard to the full liability of each one of them to the then plaintiff Now the 4th defendant admitted his liability and appearing in person it seems that he put in no written statement In any event his liability, which he admitted was not affected by the question whether his co defendants were or were not liable to the plaintiff Next, though in this respect the case of the 4th defendant differed from that of the other defendants, I cannot doubt but that the real contest in that suit was, and remained a contest between the plaintiff and the other defendants It is the fact that it was necessary for the Court to decide the question whether the other defendants were or were not members of the partnership But I cannot concede that it was necessary to come to this decision in order to adjust and determine the rights and liabilities of the co defendants *inter se* On the contrary I think that that decision was required in order to determine the contest between the plaintiff and the defendants Nor does it appear to me how it can properly be said that the decision did in fact determine the rights and liabilities of the defendants *inter se* for those rights and liabilities were not put in controversy The controversy was between the then plaintiffs and the present respondents and that remained the only real controversy notwithstanding that the present plaintiff then dissociated himself from his then co-defendants on a point which did not affect his liability in that suit Applying, therefore the

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language which I have quoted from the judgment of Vice-Chancellor Wigram in *Cottingham's case* [1], I would say that the relief given to the plaintiff in the suit of 1910 did not require or involve a decision of any case between the co-defendants, and, therefore, the co defendants are not to be bound as between each other by the Court's proceeding and decision which were necessary only to the decree which the plaintiff obtained

On these grounds I am of opinion that the appeal should be allowed and the cause be remanded to the lower appellate Court to be heard and decided on the merits

Costs to be costs in the appeal

HAYWARD, J —I concur The plaintiff-appellant's brother sought in the former suit to make the plaintiff appellant and the respondents-defendants liable for a deposit as members of a certain firm The plaintiff appellant admitted his liability, but the defendants respondents were successful in denying their membership of the firm The plaintiff-appellant in the present suit has sought to make the defendants-respondents liable for accounts upon a dissolution of the firm, and the question which has arisen is whether the membership of the defendants-respondents in the firm is *res judicata* by reason of the former litigation That question depends upon the consideration whether this matter was really in conflict between them and whether there was a real decision as to their rights in this respect in the former litigation Those are the principles laid down in the leading case of *Ramchandra Narayan* v *Narayan Mahadev* [2]

Now it appears to me that in the former suit the appellant's brother and the respondents were the parties

[1] (1843) 3 Hare 627 [2] (1886) 11 Bom 216 at p 220

actually in conflict The appellant and respondents had no real conflict *inter se* Each would have been liable for the claim in full in those proceedings if a member of the firm Each would have been liable to have been sued separately and each would have been liable even in case of a joint and several decree against all to pay in execution the whole amount due from the firm The appellant s liability as a member of that firm did not it seems to me, depend in any way on the respondents being members of that firm so far as his liability then under litigation

Moreover, it appears to me that there was no real decision in that former suit as to the rights of the appellant and the respondents which comprise such matters as liability for contribution for moneys levied in execution or otherwise in connection with the former litigation and their respective shares in the profits and losses which might prove on account taken to have been the result of the working of the firm There was no decision at all of such interests and there could not have been any such decision in those proceedings There was no real decision as to the rights of the appellant and respondents in the present suit which is for dissolution and accounts of the firm

The decision in the former litigation cannot, in my opinion, be held to be *res judicata* of the questions arising in the present proceedings The decree, therefore, of the lower appellate Court must be set aside and the appeal remanded for decision on the merits

Costs costs in the appeal

Decree set aside case remanded

R R.

CRIMINAL APPELLATE

Before Mr Justice Batchelor and Mr Justice Hayward

1915 EMPEROR v FAKIRA APPAYA*

September 23

Practice—Charge to Jury—Misdirection—Omission to direct Jury on points telling in accused's favour—High Court—Interference—Statement made by accused before Committing Magistrate—Admissibility—Criminal Procedure Code (Act V of 1898) section 287—Indian Evidence Act (I of 1872) section 24—Person in authority—Police Patil arresting the accused

The High Court will interfere in those cases where it is made to appear that the Sessions Judge has prejudiced the accused by omitting from his charge to the Jury points of capital importance telling in accused's favour

The phrase "a person in authority" in section 24 of the Indian Evidence Act would include the Police Patil who arrests one of the persons accused of the offence

Quære—Whether the statement made by an accused before the Committing Magistrate is governed by section 287 of the Criminal Procedure Code or by section 24 of the Indian Evidence Act?

THIS was an appeal from conviction and sentence passed by A Montgomerie, Additional Sessions Judge of Belgaum

The facts were that the accused was tried for having caused the death of one Yamnaya on the 5th February 1915 The deceased had a mistress named Ningawa (accused No 1) She was arrested on the 12th when she confessed that she had decoyed the deceased on the night in question to her house, where he was belaboured and killed by accused Nos 3 and 4 Before the Committing Magistrate the accused No 2 made a statement admitting the part he had taken in beating the deceased

When the accused were tried before the Court of Session, accused No 2 retracted the statement that he

* Original Appeal No 295 of 1915

had made on the ground that it was made through inducement offered by one Annappa, the Police Patil In the Police inquiry into the case Annappa had taken a part, by arresting accused No 4

The learned Sessions Judge allowed the statement made by accused No 2 before the Committing Magistrate to go into evidence and summed up to the Jury the case against the accused No 2 thus —

Similarly with regard to the statement made by accused No 2 before the Magistrate he has told you that he was induced to make that statement by some obscure representation made to him by one Annappa Gauda Patil Even if that be true it would not invalidate that confession because I do not think that Annappa Gauda Patil can be considered as in any way a person having authority within the meaning of section 24 of the Indian Evidence Act It is not suggested that this confession was made at the instance of any police official in charge of the case It is not clear what inducement was offered to the accused to make a statement which according to himself he knew at the time to be false You are asked to believe that to oblige a person who apparently was not on particularly intimate terms with him—in fact he was not on intimate terms at all with him—the accused voluntarily after having been in magisterial custody for some time falsely accused himself of having committed a murder in the hopes of getting a pardon Now if he had not committed the murder do you think it likely that he would involve himself in so serious a charge as murder? So there seems no reason in the world why at the bare request of a stranger he should falsely accuse himself of a crime for which he ran a risk of being hanged

With regard to accused No 2 the principal evidence against him consists of his own confession before the Committing Magistrate I have already discussed with you the circumstances under which he is alleged to have been induced to make that confession Before the Committing Magistrate he admits that he pointed out to the police a spot in the field of Hutch Balia That part of his statement is corroborated by the police I see no reason to doubt the testimony of the police officer as to the circumstances under which he went to Hutch Balia's field to make examination According to the police officer and according to the Panchnama he took with him the accused who pointed a spot in the field where some rubbish consisting mostly of jowari stalks was lying and in that place were found two small patches of earth (one was it was the size of a palm and the other of two palms) which apparently had been soaked and from which according to the police officer emitted the smell of a dead body Unfortunately that earth was not

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forward d for examination no doubt owing to lack of technical knowledge on the part of the police officer The fact remains however that accused No took the police to this spot and pointed out a place where the earth smelling of some decaying organic matter'

Now you will notice that there is a difference between that statement and the confession of Ningawa Ningawa does not mention the part played by accused No 2 and his brother she does not mention their names in her confession but like accused No 2 she attributes the principal part of the assault on Yemnaya to Appya and Ningawa It may be of course that Ningawa is trying to shelter her own relatives it may be that the part played by them was of less importance that is for you to decide As I said to you accused No 2's confession is in a way corroborated by the fact that scratches were actually found on his face when he was arrested The only other evidence against him is that of Mahomed and says that he met all these accused on the night on which Yemnaya disappeared He says that he saw accused Nos to 5 and Ningawa coming together he asked where they were going Y and Fakira (accused Nos 3 and ?) said that they were going to Ningawa's house

If you believe the confession of accused No 2 you must convict him murder

The Jury returned a verdict of guilty against the accused and the Judge accepted the verdict and sentenced him to transportation for life

The accused appealed to the High Court

Nilkanth Atmaram, for the appellant —The statement made by the accused was in the nature of a confession, and having been induced by Annappa was inadmissible in evidence under section 24 of the Indian Evidence Act Annappa was a person in authority see *Reg* v *Navroji Dadabhai*,[1] *Empress* v *Rama Birapa*,[2] and *The Queen* v *Mussumat Luchoo*[3]

Besides the charge to the Jury is defective inasmuch as it fails to draw the attention of the Jury to points that tell in favour of the accused, *e g*, the long time that elapsed between the arrest of the accused and

(1) (1872) 9 Bom H C R 358 (2) (1878) 3 Bom. 12
(3) (1873) 5 N W P H C R. 86.

his confession, that there was no reason why the accused had not confessed soon after his arrest, that the object of the confession was to get additional evidence against the accused No 4 with whom Annappa was on hostile terms Refers to *Emperor* v *Malgouda*[1] *Reg* v *Fattechand Vastachand*[2] and *The Queen* v *Nim Chand Mookerjee*[3]

S S Patkar, Government Pleader for the Crown — The statement made by the accused is admissible under section 287 of the Criminal Procedure Code Further Annappa is not a person in authority, as he was not the Patil of the village where the offence had been committed

As regards the charge to the Jury the pleader for the accused must certainly have placed before the Jury every point in the case that told in favour of the accused No prejudice to the accused be shown, if the Judge omitted to enumerate any of the points in his charge

BATCHELOR, J —The appellant here was the 2nd accused before the Court of Session Altogether there were five persons accused of the murder of one Yemnaya, and of these five the present appellant and another were convicted The trial was held before a Jury and in the case of this appellant the Jury was unanimous against him

The case for the prosecution was that one Ningawa, the first accused before the Sessions Court, was the mistress of the deceased man that she and several other villagers having a cause of ill-will against him, he was lured by her into her house on the 5th February last, that there he was murdered by the accused, that his dead body was carried away to a field about 1½ miles

(1) (1902) 27 Bom 644 (2) (1868) 5 Bom H C R 85 (Cr C)
(3) (1873) 20 W R 41 (Cr Rul)

distant, and was on a subsequent date removed to another spot in the site of a neighbouring village The dead body was discovered in the morning of the 9th of February, and that night the woman Ningawa was arrested The present appellant was arrested on the 10th of February On the 12th of February, Ningawa made a confession before the First Class Magistrate Mr Patankar, in which she said that the murder had been committed by the accused No 4 and his two sons She did not name the present appellant as having taken part in the crime After all the five accused had been arrested, the enquiry proceeded as usual before the Committing Magistrate, Mr Maxwell, and before that Magistrate on the 19th March the present appellant made the statement, Exhibit 25 That statement is of a confessional character and was subsequently repudiated in the Court of Session on the ground that it had been induced by promises held out to the appellant by one Annappa Gauda, who was the Police Patil of the village where the appellant lived and who had taken part in the investigation of this crime

There can be no doubt upon the record, and indeed, neither side has attempted to question that the conviction of this appellant was based entirely upon his statement to Mr Maxwell Exhibit 25 The record does indeed contain one or two fragments of other evidence which might be pressed into the service of the prosecution by way of corroboration But they are of such very minor importance that admittedly no conviction could be had upon them even if they would by themselves amount to fair justification for the appellant's commitment for trial I propose, therefore, to say no more in regard to these unimportant pieces of evidence but to deal with the case as a conviction which must stand or fall with the appellant's statement to the Committing Magistrate

The first point urged before us by Mr. Nilkanth the learned pleader for the appellant, is that the appellant's statement, Exhibit 25, was a confession; that as such it fell within the provisions of section 24 of the Indian Evidence Act; and that in accordance with those provisions it was irrelevant in these criminal proceedings, inasmuch as it was caused by an inducement or promise having reference to the charge against the appellant proceeding from Annappagauda who was a person in authority, and sufficient to give the appellant grounds which would appear to him reasonable for supposing that by making it he would gain some advantage in reference to the proceedings against him. The learned Government Pleader has met this argument by the contention that the statement Exhibit 25 cannot be brought within the purview of section 24 of the Indian Evidence Act but falls exclusively under section 287 of the Criminal Procedure Code. That section enacts that "The examination of the accused duly recorded by or before the Committing Magistrate shall be tendered by the prosecutor and read as evidence." There is no question but that this particular statement embodies the examination of the accused before the Committing Magistrate and that that examination was duly recorded by that Magistrate. It would seem, therefore to follow under this section that the statement is necessarily receivable in evidence and that the Court is bound so to treat it. It is contended with some plausibility that the imperative provisions of section 287 of the Criminal Procedure Code cannot be displaced by reference to section 24 of the Indian Evidence Act which should be read as referring only to confessions made outside the course of the regular proceedings in the inquiry and trial. The rival argument upon this point indicates that where the statement made by an accused before a Committing Magistrate is of a confessional

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character, there is at least, at first sight, some difficulty in reconciling the requirements of section 287 of the Criminal Procedure Code with those of section 24 of the Indian Evidence Act. The matter is not free from difficulty, and as, in my opinion, the appellant is entitled to succeed upon another and an independent point, I prefer to express no decided opinion upon the provisions of the sections of the two statutes, when read together, as bearing upon a statement of a confessional character made by an accused before a Committing Magistrate. I will, therefore, assume for the purposes of this case that the learned Government Pleader is right in his view that section 287 of the Criminal Procedure Code must govern this statement, and that in consequence the statement was properly receivable in evidence and laid before the Jury.

On this basis there remains the other argument of Mr. Nilkanth, that the verdict of the Jury ought to be set aside by reason of the learned Judge's misdirection regarding the truth of this statement, Exhibit 25. In the main Mr. Nilkanth's argument has taken the form that the learned Judge omitted to direct the Jury upon certain capital points on this topic. And though in general the Court may be indisposed to interfere with the Judge's charge to the Jury on the ground of mere non-direction, as opposed to mis-direction, it is, I think, clear on the authorities that in certain cases no real distinction can be drawn between non-direction and mis-direction. Upon this subject it is useful to refer to what was said by Mr. Justice Markby in the case of *The Queen* v. *Nim Chand Mookerjee*[1] where that learned Judge after observing upon the effect of the different circumstances in which different charges have to be delivered continues in these words: "When we are called upon to say whether or not the Judge has done his duty in

[1] (1873) 20 W. R. 41 at p. 42 (Cr. Rul.)

addressing the jury on the facts, we must look to his summing-up as a whole, and see that the case has been fairly laid before them. I entirely agree with this description of the Court's duty. In *Emperor* v. *Malgouda*,[1] a Bench of this Court consisting of Sir Lawrence Jenkins and Mr. Justice Batty, set aside the verdict of the Jury on the ground that the Judge had omitted to call the Jury's attention to matters of prime importance which told in the accused's favour. And this decision was arrived at, notwithstanding that the matters telling in the accused's favour appear to have been discussed before the Court by the prisoner's advocate. In *Reg.* v. *Fattechand Vastachand*[2] Mr. Justice Sargent (as he then was) took the same view of the responsibilities of a Judge in summing up to the Jury. He says: 'The summing up contemplated by this section cannot mean any statement of the evidence which a Judge may, in his caprice, think proper to make to the Jury, but a 'proper' summing up, by which is to be understood a full and distinct statement of the evidence on both sides with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest.' In another passage he observes: "I think, therefore, that the Judge committed an error in confining himself to so very brief a summary of the evidence and in not giving a more careful analysis of that evidence." And after discussing the various omissions in the charge, the learned Judge concludes by saying: "It remains to consider whether the prisoners or any of them, have been prejudiced by those omissions in the summing up." It is clear therefore that the authorities are in favour of our interference if it is made to appear that the Sessions Judge has prejudiced the accused by

[1] (1902) 27 Bom. 664. [2] (1868) 5 Bom. H. C. R. 85 at p. 94 (Cr. C.)

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omitting from his charge to the Jury points of capital importance telling in accused's favour. And, in my opinion, that is the case here. I have said that the whole case against this appellant depended exclusively upon his statement to Mr Maxwell, Exhibit 25. The following is the passage in which the learned Sessions Judge discussed this Exhibit in his charge to the Jury:—

With regard to the statement made by accused No. 2 before the Magistrate he has told you that he was induced to make that statement by some obscure *representation made to him by one Annappagouda Patil*. Even if that be true, it would not invalidate that confession because I do not think that Annappagouda Patil can be considered as in any way a person having authority within the meaning of section 24 of the Indian Evidence Act. It is not suggested that this confession was made at the instance of any police official in charge of the case. It is not clear what inducement was offered to the accused to make a statement which according to himself he knew at the time to be false. You are asked to believe that to oblige a person who apparently was not on particularly intimate terms with him—in fact he was not on intimate terms with him—the accused voluntarily after having been in Magisterial custody for sometime falsely accused himself of having committed a murder in the hopes of getting a pardon. Now if he had not committed the murder do you think it likely that he would involve himself in so serious a charge as murder? So there seems no reason in the world why at the bare request of a stranger he should falsely accuse himself of a crime for which he ran a risk of being hanged.

That no doubt is a very telling presentation of one side of the case, *and if it had been accompanied* by an equally telling representation of the other side, I do not think that any valid objection could have been offered. But unfortunately as it seems to me the numerous and weighty considerations on *the other* side were not brought to the Jury's attention, and I can well believe that on the charge as it was delivered to them the Jury felt that they had no option but to believe that the statement Exhibit 25, was true and that the evidence against accused No 2 was convincing. Among the points which as I think, the learned Sessions Judge should have invited the Jury to

consider with a view of estimating judicially the real value of this statement Exhibit 25. I may notice, first the circumstance that over a month had elapsed between the applicant's arrest and his making of this statement. It is true that this lapse of time is not altogether overlooked by the learned Judge. But whereas he uses it as an argument against the appellant, its real weight seems to me to tell on the other side. The true consideration upon this topic was, I think, that more than a month had elapsed before the statement was made and that up till the time of the making of the statement there was against this appellant no real or substantial evidence whatsoever, so that assuming him to have been one of the murderers there was no apparent occasion or reason why consistently with the usual motives of human nature he should at this late date have gone out of his way suddenly to convict himself of a crime of which no one else could have convicted him. Then I think, the learned Judge was mistaken in telling the Jury that Annappagauda Patil was not a person in authority. The evidence shows that Annappagauda was Police Patil of the appellant's village, and that he had actually arrested one of the persons accused of this murder. In *Reg.* v. *Navroji Dadabhai*[1] Sir Charles Sargent in considering the meaning of the expression 'person in authority' says that "The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would be sufficient to give him that authority." On the evidence recorded in this case I cannot doubt that Annappagauda Patil was a person in authority within the meaning of section 24 of the Indian Evidence Act.

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Then another matter of primary consequence which should, I think, have been prominently brought to the Jury's attention in connection with this Exhibit 25 was the total omission of any reference to the appellant in

[1] (1872) 9 Bom. H. C. R. 358 at p. 369.

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the accused Ningawa's confession made so early as the 12th February This omission was the more significant, because the case for the prosecution was that Ningawa who had decoyed the deceased to her house, and had there procured and superintended his murder, had no visible reason for omitting the name of the appellant if he had assisted her in this crime Next, I think the learned Judge was also in error in leaving it to the Jury to decide whether Exhibit 25, treated by him as a confession, was admissible in evidence For, if Exhibit 25 be treated in this way, then the question of its admissibility was for the Judge and not for the Jury see section 298 of the Criminal Procedure Code and the case of *Reg* v *Navroji Dadabhai*[1] to which I have already referred

Lastly, on the general merits, I would say that my own experience by no means confirms the learned Judge's view as to the conclusiveness of the argument that an Indian peasant could not possibly falsely accuse himself of murder for the mere sake of earning the good-will of his village Patil It may be conceded that it is unlikely that he would do so, but where many other considerations operate, as they do in this case, I think it was misleading to state this particular argument as if it was absolutely decisive To put the case in this way is, in my judgment, to overstate it, and to allow less than due weight to the simplicity of an unlettered peasant and his liability to yield to the influence of his Patil Here there is good ground for believing that the Patil was anxious to secure the conviction of accused No 4 and it is upon accused No 4 that the appellant's statement, Exhibit 25 casts the main responsibility for this crime

On these grounds it appears to me that the learned Judge, whose pains and care in trying this case are

(1) (1872) 9 Bom H C R 358

otherwise manifest throughout the record, did misdirect the Jury in his treatment of this Exhibit 25 I would therefore reverse the conviction and sentence and direct that the appellant be acquitted and discharged

HAYWARD J —I concur These are the relevant facts On the 5th of February the 1st accused is alleged to have decoyed the deceased Yemnava to her house where he was set upon and killed by certain other people who removed his body to a field outside the village It is alleged that from that field the body was subsequently removed to a neighbouring field in the adjoining village On the 9th of February the first accused was arrested upon discovery of the body, and on the 10th of February the 2nd accused who is the appellant here was arrested upon suspicion and is said to have pointed out the field in which the body had originally been deposited It is not alleged that it was his pointing this field which led to the discovery of the body in the field in the adjoining village On the 11th of February a witness named Mahomed was examined who said that he had seen the appellant going towards the house where the crime is alleged to have been committed upon the night of the crime On the 12th of February the 1st accused made a confession, but in that confession did not mention the name of the appellant though she implicated the 4th accused and certain others Nothing further appears to have transpired bearing upon the case of the appellant prior to the case being sent for inquiry to the Committing Magistrate, but, on the 19th of March when the appellant was called upon to explain the evidence against him he admitted his own guilt but more particularly implicated the 4th accused That statement was recorded in the regular course of the proceedings before the Committing Magistrate On the 4th of May, the appellant

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retracted this statement at his trial, and explained that he had made it under a promise of acquittal given by his village Police Patil The case against the appellant therefore, turned mainly upon the circumstances surrounding his admission in the Committing Magistrate's Court which was subsequently retracted in the Sessions Court

Now it has been argued here on appeal that there was misdirection in submitting this admission for the consideration of the Jury It has been urged that it was inadmissible, being a statement induced by the promise of acquittal held out to the appellant by a person in authority, viz his village Police Patil We have been referred to certain evidence bearing on this argument, viz the evidence of the appellant's mother in-law and of the witness Kalaya, which, no doubt, gives ground for the assertion now made on behalf of the appellant that his admission of guilt was with a view to implicate the 4th accused who was an enemy of the Police Patil We have also been referred to the fact that the Police Patil was not only the Patil of the appellant's village, but had also himself arrested the 4th accused in connection with the inquiries made by the Police If the appellant's admission had been a confession made before trial it would, no doubt have been incumbent upon us to consider and decide the facts For they would if true, indicate a promise given by the Police Patil of the appellant's village who was in the circumstances clearly a person in authority in regard to the charge against the appellant within the meaning of section 24 of the Indian Evidence Act The determination of these facts would be within our province as the relevancy of the confession would have been a matter for decision not by the Jury but by the Judge under the provisions of section 298 of the Criminal Procedure Code The appellant's admission, however

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was not a confession recorded before trial, and it seems to me more than doubtful whether it is liable to the application of the rule laid down in section 24 of the Indian Evidence Act It was not a confession recorded under section 164 of the Criminal Procedure Code, but in the course of the committal proceedings under sections 342 and 364 and it has been further expressly provided by these rules of procedure enacted after the Indian Evidence Act that statements of the accused recorded in the course of the committal proceedings shall be read in evidence before the Sessions Court, namely, by section 287 of the Criminal Procedure Code

But there were in this view of the case, these relevant facts bearing on the truth or otherwise of this admission for the consideration of the Jury The first accused, who made a full confessional statement and would appear therefrom to have been cognizant of all the circumstances, never mentioned the name of the appellant though she specified in detail the names of the other persons concerned in the crime The appellant did point out a field, but the mere pointing out of a field would not necessarily imply guilt as it does not appear that any definite discovery resulted from his action such as would necessarily implicate him in the crime The witness, Mahomed stated he had seen the appellant near the scene on the night of the offence but that again was not a circumstance which would necessarily implicate him in the conspiracy to kill the deceased It was not until nearly 1½ months afterwards that the appellant without any apparent reason and without any further evidence having been procured against him made the admission of his guilt It was remarkable that this admission particularly implicated another man accused No 4 These facts had an important bearing upon the explanation urged on behalf of the appellant that it was under promise of

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acquittal in consideration for the implication of accused No 4, an enemy of appellant's village Police Patil, that he made a false admission of guilt before the Committing Magistrate It is our duty, therefore, to satisfy ourselves whether these important facts were fairly laid before the Jury when the appellant's admission of guilt was submitted to their consideration by the learned Sessions Judge It appears to me after a careful consideration of the whole charge that they were not and in that view no other conclusion is, in my opinion, possible than that there was a legal misdirection For a charge should be "a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest" is stated by Sargent J in the case of *Reg* v *Fattechand Vastachand*[1] There was, therefore, in my opinion, a legal misdirection notwithstanding the evident care in the trial of the case exhibited by the learned Sessions Judge There can, further, in my opinion, be no question that that misdirection did prejudice the appellant For those important facts have raised grave doubts in my mind as to the truth of the appellant's admission and practically the only evidence against him was admission before the Committing Magistrate, an admission which was uncorroborated and had been retracted before the Sessions Court

The conviction and sentence ought therefore, in my opinion to be set aside and the appellant ought to be acquitted and discharged

Accused acquitted

R R

[1] (1868) 5 Bom H C R 85 at p 94 (Cr C)

ORIGINAL CIVIL

Before Mr Justice Davar

In re DWARKADAS TEJBHANDAS

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September 27

he Presidency Towns Insolvency Act (III of 1909) section 17—Suit by creditors against an adjudicated insolvent—Suit commenced without the leave of the Court—Application for leave after the institution of the suit—Application refused

The leave contemplated under section 17 of the Presidency Towns isolvency Act (III of 1909) is leave which ought to be obtained before the mmencement of a suit and cannot be granted after the same is filed

APPLICATION for leave under section 17 of the Presiency Towns Insolvency Act (III of 1909)

Dwarkadas Tejbhandas, Khusbeiam Tejbhandas and Giidhardas Tejbhandas trading in the name of Tejbhanlas Dwarkadas were adjudicated insolvents by an order of the High Court at Bombay on the 11th of April 1912 The firm of Nursoomal Gokaldas claiming to be the insolvents creditors for Rs 7,100 filed three suits in the Shikarpore Court in 1915, in ignorance of the fact that their debtors had been adjudicated insolvents and that all the property of the debtors had vested in the Official Assignee From the date of their adjudication up to the filing of the suit nothing was done to proceed with the insolvency The adjudicated insolvents were not even called upon to file their schedule At the hearing of the suits the insolvents objected to the trial proceeding, on the ground that the plaintiffs had not obtained the leave of the Court under section 17 of the Presidency Towns Insolvency Act before filing suits against them The Trial Judge was of opinion that the defect could be cured by the plaintiffs obtaining the necessary leave even after the institution of the suit He accordingly adjourned the hearing of the suits to enable the plaintiffs to apply for leave under section 17 to the High Court at

The said pl untiffs thereupon applied foi to the High Court in its insolvency jurisdiction

Shangman foi the applicants, cited *Lang v Heptullabhai Ismailji*[1], *In re Wanzer, Limited*[2] *Brownscombe v Fair*[3], and referred to the Indian Companies Act, section 171

C A V

[illegible] AR, J —Dwarkadas Tejbhandas, Khusheram [illegible] and Girdhardas Tejbhandas, who were [illegible] in the name of Tejbhandas Dwarkadas, on the 11th of April 1912, on the application of of their creditors adjudicated insolvents in this and by an order made on such adjudication all their property vested in the Official Assignee From the date of the adjudication up to the present time nothing seems to have been done The adjudicated insolvents have not even been called upon to file their schedule

It appears that the firm of Nursoomal Gokaldas, who claim to be the insolvents' creditors for Rs 7,100 in entire ignorance of the fact that their debtors had been adjudicated insolvents, filed three suits in the Shikarpore Court in 1915 to recover the sums of moneys which they alleged were due to them When the suits came on the Judge's Board for hearing the insolvents objected to the suits going on, on the ground that the plaintiffs therein had not obtained the leave of the Court under section 17 of the Presidency Towns Insolvency Act before filing suits against them The learned Subordinate Judge while recognising the force of the objection seems to have been of opinion that the defect could be cured by the plaintiffs therein obtaining the necessary leave even after the institution of the

(1) (1913) 38 Bom 359 (2) [1891] 1 Ch 305
(3) (1887) 58 L T 85

suits and he adjourned the hearing of the suits to enable the plaintiffs therein to apply for leave under section 17 to this Court.

Mr. Strangman on behalf of the plaintiffs in these Shikarpur suits now applies for leave to continue the suits. The question for decision is: have I power as Judge dealing with insolvency proceedings under the Presidency Towns Insolvency Act to grant leave under section 17 *after* the suits have been instituted?

The question has been fully argued before me by the learned counsel for the applicants and I regret to say I feel more than ever convinced that the view I expressed on a previous occasion is the only possible view to take of the provisions of this section. I use the word *regret* advisedly because I feel that my decision if correct will entail much hardship on the applicants. They filed the suits without any knowledge that their debtors had been adjudicated insolvents and if the suits now fail not only would they be prejudiced in costs but it is possible that it may be argued that their claims are barred by the law of Limitation. This is undoubtedly a case of great hardship.

The words of the section are so clear and unambiguous that there is no possibility of construing them in any way other than that leave must be obtained before the commencement of the action.

Omitting words that do not apply to this case the section runs as follows:—

"No creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall during the pendency of the insolvency proceedings *commence* any suit ... except with the leave of the Court."

The words of the section are so clear and explicit that they leave no room for any construction other than the one I have placed upon them. No creditor shall *commence* a suit except with leave. This provision clearly negatives the suggestion that a suit commenced

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In re DWARKADAS TEJBHANDAS

without leave can be continued by obtaining leave at any stage thereof

Mr Strangman has cited two English cases on the analogy of which he asked me to give him leave now These cases have no bearing on the question before me I have to construe a section of an Indian Act The language of that section is so clear and emphatic that it can bear only one construction and it seems to me futile to invoke the assistance of cases decided under the provisions of other laws of another country

The learned counsel for the applicants has stated to me that Brother Macleod gave leave under section 171 of the Indian Companies Act after a suit had been filed without leave and he has relied on the fact that the phraseology of the two sections is the same I have, however, nothing before me to show under what circumstances such leave was granted and what were the facts of that case If the matter had been argued before the learned Judge and he had decided the point after considering the section there would be some judgment showing the reasons for a decision which obviously would appear to be in conflict with the language of the section and I would have considered the judgment with great respect, but there is nothing before me which affects my judgment in the present case

It is quite clear to my mind that the leave contemplated under section 17 of the Presidency Towns Insolvency Act is leave which ought to be obtained before commencement of a suit and cannot be granted after the same is filed

I must, therefore, refuse the application

Attorneys for the applicants Messrs *Mulla & Mulla*

Application rejected

G G N

APPELLATE CIVIL

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September 30

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

JAYAWANT JIVANRAO DESHPANDE (ORIGINAL PLAINTIFF) APPELLANT *v* RAMCHANDRA NARAYAN JOSHI AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS *

Indian Limitation Act (IX of 1908) Schedule I Arts 140 141—Suit by a reversioner—Mortgage—Redemption—Widow disappearance of—Presumption of death—Onus of proof—Indian Evidence Act (I of 1872) section 108

One S died leaving him surviving his widowed daughter in law R In 1860 R passed a mortgage bond in favour of the 1st defendant's father In 1865 R disappeared and was not heard of since 1870 In 1911 the plaintiff as the reversioner of S sued to recover possession of the property alienated by R The defendants pleaded limitation The first Court d ... in plaintiff's favour on the ground that under section 108 of the Indian Evidence Act the Court must presume that R died at the time of the suit and therefore the claim was in time The lower appellate Court reversed the decree and dismissed the suit holding that the presumption of R's death at the time of the suit could not be drawn and that the *onus probandi* which lay heavily on the plaintiff to show when R died was not discharged The plaintiff having appealed —

Held that it lay on the plaintiff to show affirmatively that he had brought his suit within twelve years from the actual death of R

Nepean v *Doe d Knight*[1] followed

Article 141 of the Limitation Act is merely an extension of Article 140 with special reference to persons succeeding to an estate as reversioners on the cessation of the peculiar estate of a Hindu widow But the plaintiff's case under each article rests upon the same principle The doctrine of adverse possession does not obtain in regard to such suits and the plaintiff suing in ejectment must prove whether it be that he sues as remainderman in the English sense or as a reversioner in the Hindu sense that he sues within twelve years of the estate falling into possession and the onus is in no way removed by any presumption which can be drawn under the terms of section 108 of the Evidence Act 1872

SECOND appeal against the decision of G V Yande..., First Class Subordinate Judge, A P, reversing the decree passed by V P Ravi..., Subordinate Judge at Barsi

* Second Appeal No 309 of 1914

(1) (1837) 2 M & W 894

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JAYAWANT JIVANRAO
v.
RAMCHANDRA NARAYAN

Suit for redemption or for possession of property.

The facts of the case were as follows:—

The property in suit originally belonged to one Shamrao. Shamrao had a son Kakaji who predeceased him but left a widow Rangubai. Rangubai survived Shamrao and she during her life enjoyed the property.

On the 21st January 1860, Rangubai passed a mortgage bond in favour of Narayan, father of the 1st defendant.

On the 18th February 1860 a money bond was passed by Rangubai to one Bodhraj who in 1861 filed a suit against her on the bond and obtained a decree on the 9th December 1862. The property was sold in execution of that decree and Bodhraj became purchaser at the execution sale in February 1868.

In the year 1865 Rangubai disappeared. She was not heard of since 1870 when she received cash allowance.

In 1868 Narayan filed a suit against Bodhraj on the mortgage bond and obtained a decree on the 20th September 1870 establishing his right as mortgagee and ordering the defendant Bodhraj to pay Rs. 882 to Narayan in satisfaction of the mortgage debt within six months and in default the right of Bodhraj to redeem to be extinguished. Bodhraj having failed to pay the property remained in the possession of Narayan.

In the year 1911, the plaintiff sued as reversioner of Shamrao for redemption of the mortgage or if it be held that the mortgage was not subsisting for ejectment of the defendants.

The defendants who were the sons and alienees of Narayan contended *inter alia* that the right to redeem had become extinct; that Rangubai had not been heard of for many years and that the plaintiff's claim was barred by limitation.

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JAYAWANT JIVANRAO v. RAM CHANDRA NARAYAN

The first Court decided the case in favour of the plaintiff on the ground that under section 108 of the Indian Evidence Act, the Court must presume that Rangubai died at the time of the suit and therefore the plaintiff's claim was in time

The lower appellate Court reversed the decree and dismissed the plaintiff's suit as barred by limitation on the following grounds —

Plaintiff sues as reversionary heir He must show when Rangubai died There is no evidence on the record to show the date on which or the month or year in which she died The lower Court has held that Rangubai died at the time of this suit that Court has drawn the presumption of Rangubai death at the time of the suit under section 108 of Indian Evidence Act of 1872 It has cited the authorities of the cases of I L R 35 Cal 25 and I L R 37 Cal page 103 in support of its observation in the matter I have carefully gone into those authorities and I am unable to find therein anything which would justify a Court of justice in presuming that a person unheard of died at the time of the suit in which the question of his death is raised It has been expressly held in I L R 35 Cal 25 that section 108 of the Evidence Act raises no presumption as to the time of a person's death Under that section death is to be presumed after a certain interval and the burden of proving that the person presumed to be dead at the time of the suit is alive at that time is shifted to the person who affirms it That section provides for the burden of proof when the question is whether a man is alive or dead The only presumption enacted by that section is that the party unheard of is dead at the time of the suit but that section does not warrant any presumption as to the time of his death That section is clear on the point The authorities of I L R 23 Bom 296 Bombay Law Reporter Volume VIII page 226 and I L R 8 All 614 confirm the same view of the matter The question of a person's death and question of a particular time of his death are two different questions The latter question is not contemplated by section 103 aforesaid The lower Court has erred in presuming that Rangubai died at the time of the suit Exhibit 15 tends to show that Rangubai died before 18th November 1909 Thus the presumption of her death at the time of the suit cannot be drawn The *onus probandi* is heavily on plaintiff to show when the said Rangubai died He has failed to discharge the onus It was incumbent on plaintiff to show that he was the nearest surviving reversionary heir of the deceased Shamrao at the time of the said Rangubai's death This plaintiff has not done The lower Court has found in plaintiff's favour as to these matters on the presumption that Rangubai died at the time of the suit This presumption is not warranted by law

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The plaintiff appealed to the High Court

H C Coyajee with *N V Gokhale* for the appellant — We accept the mortgage and sue to redeem it For such a suit we are within time

[SCOTT, C J —In that case you are bound by the foreclosure decree against Bodhraj]

Apart from the mortgage we submit that Art 141 of the Indian Limitation Act unlike Art 144, has nothing to do with adverse possession, but a suit can be brought within twelve years of the date when the female dies see *Cursandas Govindji* v *Vundravandas Purshotam*[1] confirmed by the case of *Runchordas Vandravandas* v *Parvatibhai*[2], *Mukta* v *Dada*[3], *Hathising* v *Sati lal*[4] *McIntosh* v *Jharu Molla*[5] and *Pedder* v *Hunt*[6] The widow must be presumed, under section 108 of the Indian Evidence Act, to have died only on the date of suit and the burden is therefore on the defendant to prove that she was not alive during the twelve years preceding the suit see *Fani Bhushan Banerji* v *Surjya Kanta Roy Chowdhury*[7] *Narki* v *Lal Sahu*[8], *Veeramma* v *Chenna Reddi*[9] and *Muhammad Sharif* v *Bande Ali*[10]

Campbell with *K N Koyajee*, for the respondent — If the Indian cases cited lay down a rule of law that under section 108 of the Indian Evidence Act, a person not heard of for seven years must be presumed to have died on the date of the suit, it is not good law It may be presumed that such a person was dead at the date of the suit not that he died on that date, and indeed the presumption of death arises at the end of the first seven years of the period during which such a person was

(1) (1889) 14 Bom 482
(2) (1899) L R 26 I A 71
(3) (1893) 18 Bom 216
(4) (1899) 2 Bom L R 106
(5) (1894) 22 Cal 454 at p 455
(6) (1887) 18 Q B D 565
(7) (1907) 35 Cal 25
(8) (1909) 37 Cal 103
(9) (1912) 37 Mad 440
(10) (1911) 34 All 36

not heard of, but the precise period *during those seven years* at which he died must be proved by actual evidence Taylor on Evidence 10th Edn p 200, *Nepean v Doe d Knight*[1] The case of *Nepean v Doe d Knight*[1] is also authority for the proposition that an ejectment by a remainderman or reversioner must be brought within the statutory period of limitation after the original right of entry of the plaintiff has accrued whatever be the nature of the defendant's possession, adverse or non-adverse, and that it is for the plaintiff to prove affirmatively the date of this right of entry within the prescribed period

SCOTT, C J —This suit was brought by the plaintiff, claiming to be the reversioner of one Shamrao the original owner of the property for redemption of a mortgage or for possession of the property Shamrao, the original owner had one son Kakaji who predeceased him, but left a widow Rangubai Rangubai survived Shamrao, and she during her life enjoyed the property She passed a mortgage-bond in favour of Narayan father of the 1st defendant, on the 21st January 1860 In 1865 she disappeared and she has not been heard of probably since 1865 or certainly since 1870 when she is alleged to have received a cash allowance In 1861 a suit was filed against her by Bodhraj on a money-bond passed by Rangubai to him on the 18th February 1860 and Bodhraj obtained a decree on the 9th December 1862 The property was sold in execution of that decree, and Bodhraj became the purchaser at the execution sale in February 1868 In the same year Narayan, the father of defendant 1, filed a suit against Bodhraj on the mortgage bond, and eventually a decree was passed in the appellate Court in favour of Narayan establishing his right as mortgagee, and ordering the defendant Bodhraj to pay Rs 882 to Narayan in satisfaction of the

[1] (1837) 2 M & W 894

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mortgage-debt within six months, and declaring that if the payment was not made within the time specified, Narayan would become the absolute owner and Bodhraj would be foreclosed That decree was passed on the 20th September 1870, yet notwithstanding the decree, the plaintiff sues as the reversionary heir of Shamrao for redemption of the mortgage, or if it be held that the mortgage is not subsisting for ejectment of the defendants

The first Court decided the case in favour of the plaintiff on the ground that under section 108 of the Indian Evidence Act the Court must presume that Rangubai died at the time of suit, notwithstanding that she had not been heard of, at all events since 1870, and that, therefore the plaintiff's claim was in time, and he was entitled to recover on the death of Rangubai as the reversioner

From that decision an appeal was preferred to the lower appellate Court which reversed the decree and we have now to decide whether the decision of the lower appellate Court is correct Dealing first with the position under the mortgage bond, under certain circumstances the mortgage might have been binding upon the reversioners, but it is found as a fact that the mortgage was not passed by Rangubai for any legal necessity or for justifying cause It, therefore, bound only the interest of Rangubai in the property The mortgage by reason of the foreclosure decree on default by Bodhraj in 1870 came to an end, and the mortgagee became entitled as against Rangubai to the position of an absolute owner of her estate in the mortgaged property There is, therefore, no mortgage in existence which can be redeemed, and the only question is whether the plaintiff can succeed in his suit as a reversioner upon the death of Rangubai having regard to the provisions of Article 141 of the Limitation Act

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Now his suit assumes the death of Rangubai, otherwise he could not claim to be a reversioner. But the learned Judge of the trial Court has held that Rangubai's death occurred at the time when the suit was filed. That assumes that the plaintiff is entitled to rely upon the absence of news of Rangubai as proof of a fact, the onus of proving which lies upon him namely, that he sues within twelve years of the estate opening for the benefit of reversioners. Article 141 of the Limitation Act is merely an extension of Article 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each Article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits and the plaintiff suing in ejectment must prove, whether it be that he sues as a remainderman in the English sense or as a reversioner in the Hindu sense, that he sues within twelve years of the estate falling into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of section 108 of the Evidence Act.

The exact point for the purpose of Article 140, and also, in our opinion of Article 141, has been decided many years ago in England soon after the passing of the English law of Limitation regarding Real Property in *Nepean* v. *Doe d. Knight*[1]. The facts there were that one Matthew Knight, a previous owner of the property, was last heard of in May 1807, and the declaration in the action for ejectment which was brought by the reversioner or remainderman was dated the 18th January 1831. The doctrine obtaining in England with regard to presumption of death was that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not

[1] (1837) 2 M. & W. 894.

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that he died at the beginning or the end of any particular period during those seven years Now if seven years be added to May 1807 when Matthew Knight was last heard of, it would bring us to May 1814 within twenty years of the date of the declaration in the action Twenty years was the period within which under the Real Property Limitation Act the plaintiff must bring his suit in ejectment It was however, held that there was no presumption that Matthew Knight had died on the last day of those seven years or on any particular day within those seven years, and that the plaintiff must establish by affirmative proof that he brought his suit within twenty years of his lessor's estate falling into possession Lord Denman delivering the judgment of the Court said (p 912) —

> The doctrine laid down is that where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead but not that he died at the beginning or the end of any particular period during those seven years that if it be important to any one to establish the precise time of such person's death he must do so by evidence of some sort to be laid before the jury for that purpose beyond the mere lapse of seven years *since such person was last heard of*

And later he continues —

> It is true the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff He has shown the death by proving the absence of Matthew Knight and his not having been heard of for seven years whence arises at the end of those seven years another presumption of law namely that he is not then alive but the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued that is after the actual death of Matthew Knight Now when nothing is heard of a person for seven years it is obviously a matter of complete uncertainty at what point of time in those seven years he died

It was therefore held that the plaintiff had not succeeded in discharging the onus which was upon him although the declaration was within twenty years of

the expiry of the seven years from the last news of the death of Matthew Knight

That case appears to us to be directly in point

The decision of the Appeal Court *In re Phene's Trusts*[1] only throws doubt upon the statement of Lord Denman that the law presumes that a person shown to be alive at a given time remains alive until the contrary is shown on the ground that if the man could only be presumed to be dead after seven years from the date of the last news of him a presumption of life would carry his existence up to the end of the seven years as was held (as Giffard L J thought wrongly) by Vice Chancellor Malins in *In re Benham's Trust*[2] There is more to be said for the view of Malins Vice Chancellor where the law is as stated in sections 107 and 108 of the Evidence Act

The criticism of Giffard L J does not however affect the direct application of the judgment in *Nepean v Doe d Knight*[3] to the case now before us and we must hold that it lies on the plaintiff to show affirmatively that he has brought his suit within twelve years from the actual death of Rangubai In so holding we do not run counter to any Indian decision upon section 108 of the Evidence Act

The plaintiff has not discharged the onus which lies upon him and, therefore his claim was rightly rejected by the lower appellate Court We affirm the decree and dismiss the appeal with costs

Decree confirmed

J G R

(1) (1870) L R 5 Ch 139 (2) (1867) L R 4 Eq 416
(3) (1837) 2 M & W 894

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

1915

October 1

RAMCHANDRA NARAYAN JOSHI AND OTHERS (ORIGINAL DEFENDANTS NOS 1 TO 4) APPELLANTS v SHRIPATRAO BIN TUKOJIRAO DESHMUKH AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO 5) RESPONDENTS*

Civil Procedure Code (Act XIV of 1882) sections 366 and 371—Abatement of suit—Mortgage—Joint Hindu family—Redemption suit by the mortgagor in his personal right—Second suit to redeem by co parceners not barred by abatement

One V a member of an undivided Hindu family instituted in the year 1881 a suit for redemption against the mortgagee but pending the suit he died on the 9th July 1883 On the 15th October 1883 the Court directed that the suit should abate Subsequently in the year 1912 T V s son and 3 grand sons filed a second suit for redemption of the same property alleging that the property being ancestral they had interest in it by birth It was also alleged that an adult brother of V was interested as a co parcener in the same property The trial Court dismissed the suit on the strength of the order of abatement passed on the 15th October 1883 On appeal the District Court reversed the decree and remanded the suit for disposal

On appeal to the High Court

Held that there being no indication that V s suit was brought in a representative capacity it would certainly be defective as a redemption suit according to all canons of procedure and if the suit was defective V s personal right to sue did not embrace the rights of his co parceners and none of them would be concluded by the application of section 371 of the Civil Procedure Code (Act XIV of 1882)

Held also that apart from the question raised upon section 371 there was sufficient authority for the conclusion that since the introduction of the Code of 1877 no legal proceeding by V short of actual redemption would deprive his co parceners of their right to redeem against the mortgagee

PER CURIAM —The right of a mortgagor to [illegible] in a suit against the person who executes with authority express or implied a mortgage of family property without joining the co parceners interested results from the authorised mortgage which carries with it the all embracing remedy It does not follow that the defeat of one co-owner who desires to redeem will bar the exercise of the same right by another hence arises the necessity for joining all parties interested in one suit

* Appeal from Order No 50 of 1914

APPEAL against the order passed by Dr. F. X. De-Souza, District Judge, Sholapur, reversing the decree passed by G. G. Nargund, Subordinate Judge of Barsi.

Suit to redeem and recover possession.

One Vyankatrao Deshmukh mortgaged on the 21st March 1861 two lands, survey Nos. 1 and 167 in favour of two mortgagees, viz. (1) one Ramchandra Joshi, the father of defendants Nos. 1 to 4 and (2) one Bojraj.

In the year 1871 the rights of Bojraj under the mortgage were purchased by Ramchandra who thus became the sole beneficiary under the mortgage.

In 1881 Vyankatrao instituted a suit No. 399 of 1881 against Ramchandra to redeem the mortgage of 1861. After the issues were settled in that suit, Vyankatrao died on the 9th July 1883 and as his heirs were not brought on the record the Court passed an order on the 15th October 1883 directing that the suit should abate.

Subsequently in the year 1912 another suit for redemption of the said mortgage was filed by Tukojirao, Vyankatrao's son, and three grandsons on the ground that (1) the lands mortgaged were Vyankatrao's ancestral lands in which the plaintiffs had an interest by birth, (2) that their suit was instituted in their own right and not as legal representative of Vyankatrao, (3) that in any event the order of abatement could not bind the plaintiffs because the suit was brought by Vyankatrao in his own name without adding as parties, the co-parceners of the undivided Hindu family.

The defendants contended *inter alia* that the plaintiffs not having taken steps to have their names brought on record since suit No. 399 of 1881 abated on Vyankatrao's death the second suit for redemption was not maintainable.

The Subordinate Judge found that Vyankatrao's suit was brought in a representative capacity and the order

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RAMCHANDRA NARAYAN v. SHRIPATRAO

passed therein was binding on the plaintiffs He, therefore, passed a preliminary decree holding that the plaintiffs' suit was barred under Order XXII, Rule 9 of the Civil Procedure Code, 1908

On appeal, the District Judge, reversed the decree and remanded the suit for disposal on the merits on the following grounds —

As pointed out in the case of *Narayan* v *Pandurang* I L R 5 Bom 685 and *Anusayabai* v *Sakharam* I L R 7 Bom 464 under the law in force before the year 1877 the manager of an undivided Hindu family represented the common interests of the family with regard to litigation as well as other transactions And the presumption was that a manager was acting for the family unless it was made out that he acted and professed to act for himself alone It is true that doubts were expressed by Sargent C J in *Padmakar* v *Mahadeo Krishna* I L R 10 Bom page 21 as to the soundness of the rule so widely stated Be this as it may the consensus of authority points to the conclusion that the rule has no longer any force after the enactment of section 50 of Act X of 1877 I therefore hold that the present plaintiff not having been a party either actually or constructively to the suit No 399 of 1881 is not bound by the order of abatement passed in that suit and that he is not therefore barred from instituting the present suit by order 22 rule 9 of the Code of Civil Procedure Act V of 1908

The defendants appealed against the order of remand

Campbell with *K N Koyajee*, for the appellant — The present suit is barred under sections 366 and 371 of the Civil Procedure Code of 1882 Vyankatrao has been found to have been manager of the family and so his suit in 1881 was of a representative character No fresh suit can, therefore be instituted *Vithu Dhondi* v *Babaji*(1) *Tatyarao* v *Puttappa*(2), *Kishen Parshad* v *Har Narain Singh*(3), *Sheo Shankar Ram* v *Jaddo Kunwar*(4) *Hori Lal* v *Munman Kunwar*(5) *Madan Lal* v *Kishan Singh*(6) *Debi Singh* v *Jia Ram*(7),

(1) (1908) 32 Bom 375
(2) (1910) 12 Bom L R 940
(3) (1911) L R 38 I A 45
(4) (1914) L R 41 I A 216
(5) (1912) 34 All 549
(6) (1912) 34 All 572
(7) (1902) 25 All 214

Balwant Singh v Aman Singh[1] *Jaddo Kunwar v Sheo Shankar Ram*[2] and *Sheik Ibrahim Tharagan v Rama Aiyar*[3] The respondent's only remedy was to have brought himself on the record of the previous suit in 1883 on the death of his father or to have got the order of abatement set aside

Coyajee with *N V Gokhale*, for the respondents, not called upon

SCOTT, C J —The facts found by the District Judge are that one Vyankatrao Deshmukh mortgaged on the 21st March 1861 the lands in suit in favour of two mortgagees, and subsequently the interest of the 2nd mortgagee became vested in the 1st mortgagee In 1881 Vyankatrao instituted a suit No 399 of 1881 against the mortgagee for redemption, but after issues were settled in that suit he died, the date of his death being 9th July 1883 On the 15th October 1883, the Court directed that the suit should abate This suit was filed in 1912 by Tukojirao, Vyankatrao s son, and three grandsons for redemption upon the ground that the land mortgaged was ancestral property in which the plaintiffs, Vyankatrao s sons, had an interest with him at birth It was also alleged that an adult brother of Vyankatrao was interested as a co parcener in the same property In the trial Court the suit was dismissed on the strength of the order of abatement passed on the 15th October 1883

An appeal was preferred to the District Court which reversed the order and remanded the suit for disposal From that decree this appeal is now preferred It is contended that by reason of section 366 of the Code of 1882, the redemption suit is not maintainable by the present plaintiffs That section must be read with section 365 which provides that "In case of the death of a sole plaintiff or sole surviving plaintiff the legal

[1] (1910) 33 All 7
[2] (1910) 33 All 71
[3] (1911) 35 Mad 685

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representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the suit," and section 366 provided that "If within the time limited by law no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate" Section 371 provided that "When a suit abates or is dismissed under this Chapter [XXI], no fresh suit shall be brought on the same cause of action" Now the time limited by law for an application under section 365 was in 1883 two months The order for abatement, therefore was not without jurisdiction

The contention for the appellants in this appeal is that as Vyankatrao filed the redemption suit he represented all persons interested in the mortgaged property, and after his suit came to an end, no further suit can be instituted by any one else In support of that contention reference was made, particularly to the judgment of the Privy Council in *Kishen Parshad v Har Narain Singh*(1), and a Full Bench decision of the Allahabad High Court in *Hori Lal v Munman Kunwar*(2) With regard to the Privy Council case we are of opinion that all that was decided was as stated by Mr Justice Chamier in his judgment in *Hori Lal v Munman Kunwar*(2), that managing members of a joint family entrusted with the management of a business are competent to enforce at law the ordinary business contracts which they are entitled to make or discharge in their names We cannot regard it as an authority with regard to redemption suits

The contemporaneous decision of the same Bench *Madan Lal v Kishan Singh*(3) indicates that if a

(1) (1911) L R 38 I A 45

(2) (1912) 34 All 549

(3) (1912) 34 All. 572

manager sues on a mortgage on behalf of all his co parceners he should at least purport to sue in a representative capacity as was suggested by West J in *Gan Savant Bal Savant v Narayan Dhond Savant*[1] There is no indication here that Vyankatrao's suit was brought in a representative capacity If not it would certainly be defective as a redemption suit according to all canons of procedure *e g* Ch III and V of the Code of 1882, *Gan Savant Bal Savant v Narayan Dhond Savant*[1], *Padmakar Vinayak Joshi v Mahadev Krishna Joshi*[2] and *Bolton v Salmon*[3] If the suit was defective Vyankatrao's personal right to sue did not embrace the rights of his co-parceners and none of them can be concluded by the application of section 371 In coming to this conclusion we have not overlooked illustration (*d*) to section 361 of the Code of 1882 which treated the father's right to sue his co parcener for partition as including the right of suit of his own sons Whether that illustration was consistent with the principles of Hindu Law or not we need not here inquire for Vyankatrao at the time of his death had a brother who was also interested in the equity of redemption Apart from the question raised upon section 371, we think that the two Bombay cases above cited are sufficient authority for the conclusion that since the introduction of the Code of 1877 no legal proceeding by Vyankatrao alone short of actual redemption would deprive his co parceners of their right to redeem against the mortgagee The right of a mortgagee to enforce his security by sale in a suit against the person who executes with authority, express or implied, a mortgage of family property, without joining the co parceners interested results from the authorized mortgage which carries with it the all embracing remedy see the

[1] (1883) 7 Bom 467 [2] (1885) 10 Bom 21

[3] [1891] 2 Ch 48 at p 52

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opinion of Pontifex J quoted by the Judicial Committee in *Doulut Ram v. Mehr Chand*[1] It does not follow that the defeat of one co owner who desires to redeem will bar the exercise of the same right by another hence arises the necessity for joining all parties interested in one suit

It must not be taken from the above remarks that we assent to the view that the provision of the Code which refers to representative suits can properly be applied to suits on behalf of a Hindu family by its manager

We affirm the decree and dismiss the appeal with costs

Decree confirmed

J G R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

1915 *October 12*

THE ASSISTANT COLLECTOR OF KAIRA (ORIGINAL OPPONENT) APPELLANT v. VITHALDAS VALLAVADAS AND OTHERS (ORIGINAL CLAIMANTS) RESPONDENTS.*

Land Acquisition Act (I of 1894) section 32—Bhagdari and Narvadari Act (Bom Act V of 1862), section 3†—Unrecognised sub-division of a narva holding—Compulsory acquisition

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(1) (1887) L R 14 I A 187 at p 196

* First Appeals Nos. 182 183 184 and 185 of 1912

† The material portion of section 3 of the Bhagdari and Narvadari Act (Bom Act V of 1862) runs as follows —

It shall not be lawful to alienate assign mortgage or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narvadari village other than a recognized sub division of such bhag or share or to alienate assign mortgage or otherwise charge or incumber any homestead, building site (gabhan) or premises appurtenant or appendant to any such bhag or share or recognised sub-division appurtenant or appendant thereto apart or separately from any such bhag or share or recognized sub-division thereof

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ASSISTANT COLLECTOR OF KAIRA v. VITHALDAS

The provisions of section 32 of the Land Acquisition Act (I of 1894) cannot be made applicable to a case where the land compulsorily acquired is an unrecognised sub division of a *narva* holding

Per BATCHELOR J — The only case contemplated by the draughtsman (in section 32 of the Land Acquisition Act 1894) was the case where the legal estate was in a person possessing only a limited interest while outstanding rights were in a beneficiary or reversioner who upon the exhaustion of the limited estate would become in the words of the clause absolutely entitled to the land

FIRST appeals from the decision of C N Mehta, Joint Judge at Ahmedabad

The Government of Bombay acquired compulsorily pieces of land at Nadiad for the purposes of the Hostel to the Nadiad High School The pieces of land acquired formed unrecognised sub divisions of a *narva* holding

The Collector awarded compensation for the land so acquired

The claimants were not satisfied with the award and the Collector made references to the Civil Court under section 19 of the Land Acquisition Act, 1894 The amounts awarded by the Collector were not accepted by the claimants they were therefore sent to the District Court under section 32 (2) of the Act The claimants took away the moneys from the Court under protest

It was contended by the Assistant Collector *inter alia* that the amount of compensation awarded by the Collector was appropriate, and that the pieces of land acquired being unrecognised sub divisions of a *narva* holding, of which the claimants had no right of disposal the amounts of compensation should not be paid over to the claimants but dealt with as provided by section 32 of the Land Acquisition Act, 1894

The learned Judge enhanced the rate at which compensation should be awarded, and held that the

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provisions of section 32 of the Land Acquisition Act 1894 did not apply on the following grounds —

Under section 32 of the Land Acquisition Act the Court has to make an order of investment in cases where the land belonged to a person who had no power to alienate it I am no doubt inclined to agree with the learned Government Pleader that a long term lease is an alienation prohibited under section 3 of Bombay Act V of 1862 But I do not think a case like the present falls within the *spirit* of section 32 of the Land Acquisition Act. It was meant I think to apply to cases where possessor of the land had a limited interest in it *e g* a tenant for life guardian trustee widow administrator &c And I do not think a *narvadar* holding a portion of a *narva* is in any sense a tenant for life or a trustee for his successors or other *narvadars* of the same *narva* or any other person The main object of the Narvadari Act appears to be to prevent a *physical* dismemberment of the *narva* This prevention of dismemberment may be advantageous to Government in so far as their revenue is concerned inasmuch as the total lump assessment leviable in respect of the whole *narva* would be recoverable from all the *narva* lands in gross and from the whole body of *narvadars* of the same *narva* jointly and severally (vide *Dolsang* v *The Collector of Kaira* I L R 4 Bom 367 at p 374 *Manohar* v *Chutabhai* I L R 8 Bom 347 and *Parsholam* v *Hira* I L R 15 Bom 172) But the acquisition in the present case has been made by Government who will according to their practice hitherto presumably reduce the assessment to the extent of the acquisition (*vide* the Talati Exhibit 101) And for the balance of Government assessment payable in respect of the remaining land the same *narvadars* and the remaining land in gross will remain liable to Government In all other respect the portion falling to the share of each *narvada* is treated as his absolute property Supposing *e g* that all the *narvadars* of a particular *narva* join in selling the whole *narva* to a stranger in such a case the price realized will be divided among the several *narvadars* each of whom will appropriate his share to himself as if it were his separate private property free from the claims of his successors and other *narvadars* of the same *narva* It accordingly appears to me that a *narvadar* holding an unrecognized portion of a *narva* is not a trustee for anybody else and that accordingly a case like the present does not fall within the spirit of section 32 of the Act

The Assistant Collector appealed to the High Court contending that the compensation money should be dealt with as provided by section 32 of the Land Acquisition Act (I of 1894) and that the rate of compensation awarded was too high The claimants filed cross objection contending that the rate was too low.

S S Patkar, Government Pleader, for the appellant —The piece of land which is compulsorily acquired being an unrecognized sub division of a bhag and inalienable by its owner, the Court is bound to invest the compensation money in the manner provided for in section 32 of the Land Acquisition Act (I of 1894) The terms of the section are imperative Further, every portion of a *narva* holding being responsible for the whole assessment payable to Government the order of investment of compensation money is necessary The section is expressed in wide terms and is not confined in its operation to cases of tenants-for-life or trustees &c

G N Thakor for the respondents —Section 32 does not apply It refers only to land which "belonged to any person who had no power to alienate the same" The power of alienation contemplated seems to be absolute In the case of an unrecognised sub-division of a bhag, the only restriction upon alienation is that there must be no dismemberment of a particular bhag The Bombay Bhagdari and Narvadari Act (Bombay Act V of 1862) presents no difficulty to alienation of the bhag as a whole, that is all the several owners of a particular bhag can join together to alienate the bhag See the preamble and section 5 of the Bombay Bhagdari and Narvadari Act and *Parshotam Bhaishankar* v *Hira Parag*[1] Further the meaning of sub-section(i) of section 32 is made clear by its clauses (*a*) and (*b*) and (i) and (ii) It is not possible in the case of bhagdari lands to invest the compensation money "in the purchase of other lands to be held under the like title and conditions of ownership as the land acquired [sub-clause (*a*)], nor can the money be applied "in the purchase of such other lands as aforesaid" [sub-clause (*i*)],

[1] (1890) 15 Bom 172

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and sub-clause (*ii*) makes it clear that the person may at some further stage become "absolutely entitled to the land, a contingency which can never befall to a bhagdari land

T R Desai, for the respondent in the companion cases referred to *Manohar Ganesh Tambekar* v *Chulabhai Mithabhai*[1]

S S Pathak, in reply referred to *Collector of Belgaum* v *Bhimrao*[2] and *Shiva Rao* v *Nagappa*[3]

BATCHELOR, J —These are appeals brought from decisions of the learned Joint Judge of Ahmedabad in certain references made to him by the Assistant Collector of Kaira under section 18 of the Land Acquisition Act of 1894 The appellant is the Assistant Collector of Kaira, and the appeals raise a point of law which is attended with some little difficulty and a question of fact upon which, I think, there is no difficulty

The question of law arises from the fact that the land in controversy formed part of an unrecognized sub-division of a *narva* holding, and that being so the question is, whether the case is governed by section 32 of the Land Acquisition Act The learned Joint Judge held in the negative The contention for the appellant is that since under section 3 of the *Bhagdari* and Narvadari Tenures Act (Bombay Act V of 1862) it was not lawful to the claimants to alienate this parcel of land therefore section 32 of the Land Acquisition Act must apply and an order should be made under that section The question which appears to be *res integra* requires careful consideration of the provisions of the Acts Section 3 of the Bhagdari and Narvadari Act

[1] (1884) 8 Bom 347 [2] (1908) 10 Bom L R 657

[3] (1905) 29 Mad 117

provides so far as its provisions are now material, that —

It shall not be lawful to alienate any portion of any *bhag* or share in any Bhagdari or Narvadari village other than a recognized sub division of such *bhag* or share

Section 32 of the Land Acquisition Act so far as the section is now material, lays down that—

[Where] it appears that the land [acquired] belonged to any person who had no power to alienate the same the Court shall—(*a*) order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership or (*b*) if such purchase cannot be effected forthwith then in such Government or other approved securities as the Court shall think fit and shall direct the payment of the interest from such investment to the person or persons who would for the time being have been entitled to the possession of [such] land and such moneys shall remain so deposited and invested until the same be applied—(*i*) in the purchase of such other lands as aforesaid or (*ii*) in payment to any person or persons becoming absolutely entitled thereto

The argument for the appellant is that the only condition prescribed for the operation of section 32 is that the land should be land belonging to a person who had no power to alienate it and, since that condition is satisfied here the section must apply The learned Judge below, in disallowing this argument, explains his reasons in these words —

I do not think a case like the present falls within the spirit of section 32 of the Land Acquisition Act It was meant I think to apply to cases where the possessor of the land had a limited interest in it *e g* a tenant for life guardian trustee widow administrator &c And I do not think a *narvadar* holding a portion of a *narva* is in any sense a tenant for life or a trustee for his successors or other *narvadars* of the same *narva* or any other person

While I am timorous about appealing to the spirit of a statute in order to avoid or evade, the apparent meaning of its words, I think the learned Judge's conclusion is right And I think so because that conclusion seems to me to do far less violence to the language of section 32 than the opposing theory For, the

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most that can be said for the appellant is, as I have indicated, that the words of the conditional clause in section 3 'if it appears that the land belonged to any person who had no power to alienate the same,' are wide enough to include the case of an unrecognised sub-division of a *narva* *Prima facie* that no doubt is so But the section, so far as we are concerned with it, consists of but a single sentence, and in order to measure the sweep or ambit of the conditional clause we must, I think, have regard to the consequent clause That, indeed, amounts to no more than stating the familiar principle that the section must be read as a whole So reading it, I am satisfied, especially from clause (2), that the only case contemplated by the draughtsman was the case where the legal estate was in a person possessing only a limited interest, while outstanding rights were in a beneficiary or reversioner who, upon the exhaustion of the limited estate would become, in the words of the clause "absolutely entitled" to the land Familiar instances of such possession are supplied by the case of a Hindu widow or a tenant-for-life But no such consequences as the section prescribes can ensue in the case of *narva* land For the moneys deposited could not be applied either in the purchase of other lands to be held under the like title and conditions of ownership or in payment to any person becoming absolutely entitled For the present or late holder of this *narva* was himself absolutely entitled in the sense that no one except himself had any claim to the land, and no succeeding holder's title could be more absolute than his was That being so, I think that the apparent generality of the conditional clause must be restricted so as to correspond with the scope of the consequences expressed, and since this latter excludes the case of a *narva* holding, that holding must be excluded from the operation of the section

Though it is probable I think, that the case of a *narva* holding is a *casus omissus* from the Government of India Act the conclusion which I adopt is, in my opinion, capable of reconcilement with the provisions of section 32 for whereas that section contemplates an absolute disability to alienate in the person to whom the land belonged, the disability of the *narvadar* is not absolute but only conditional He can alienate any portion of his holding in certain circumstances, provided for instance, he joins with it another parcel so that the whole subject of the alienation is a recognised sub-division Moreover, the phraseology of section 32 suggests that the disability contemplated is only a personal disability, whereas here the disability is not in the person but is in the land itself which so long as it is an unrecognised sub-division of a *narva* is incapable of alienation in whosesoever hands it may be held On these grounds, I think, that the conclusion of the learned Judge below is right

The other opinion, it seems to me has nothing to recommend it except a seeming conformity with the words of the conditional clause, while it is wholly incapable of being reconciled with all the succeeding provisions of the statute

As to the question of fact, that is, as to the amount of the awards made by the learned Joint Judge they have been attacked as excessive by the learned Government Pleader and as inadequate by the learned pleaders for the claimants It is not, I think, necessary to reinvestigate this matter, upon which the learned Judge below has given us a careful and well considered judgment It is enough for me to say that I have heard nothing which, in my opinion would entitle us to differ from the estimate adopted by the learned

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Judge after a full consideration of all the evidence bearing upon the point

On these grounds I think that the appeals and the cross-objections should be dismissed with costs

In the taxation of costs pleaders' fees will be calculated on the difference between the award of the Collector and the award of the Joint Judge

HAYWARD, J —I concur I have only a few remarks to add upon the question of law which is not free from difficulty It seems to me that this is not a case of disability attached to a person holding land but of a disability attached to the land held No particular person has been deprived in favour of any other person of the power to alienate, but the condition of inalienability has been imposed on the land No particular person, in other words, has been restricted to a limited estate in favour of any other person vested with a reversionary estate, but the land itself has been shorn of the usual attribute of alienability by statute That appears to me to be the strict interpretation of the words it shall not be lawful to alienate any portion of any *bhag* other than a recognized sub division of such *bhag*" and 'any alienation contrary to the provisions of this section shall be null and void' of section 3 of the Bhagdari Act, V of 1862

It would appear that the former, viz, the limited owner, not the latter, the circumscribed property, has been contemplated by section 32 of the Land Acquisition Act The material words of that section are these "If it appears that the land belonged to any person who had no power to alienate the Court shall order the money to be invested in the purchase of other lands to be held under the like title or if such purchase cannot be effected forthwith, then in approved securities and shall direct the payment of

the interest to the person or persons who would, for the time being have been entitled to the possession of the said land, until the same be applied in the purchase of such other lands or in payment to any person or persons becoming absolutely entitled ' It appears to me that the expressions 'it it appears that the land belonged to any person who had no power to alienate' and 'any person becoming absolutely entitled could be applied completely and without practical difficulty only to limited owners It could not be adapted without strain of language to absolute owners of circumscribed properties Such adaptation, therefore was in my opinion not contemplated by section 32 of the Land Acquisition Act

We ought, therefore in my opinion, to dismiss the appeals and cross-objections with costs and to affirm the decisions of the learned Joint Judge

Appeals dismissed

R R

CRIMINAL REVISION

1915 October 13

Before Mr Justice Batchelor and Mr Justice Hayward

EMPEROR v MANILAL MANGALJI *

Bombay Prevention of Gambling Act (Bombay Act IV of 1887) section 3 †—Instruments of gaming—Book used for recording bets already made is an instrument of gaming

A book which is used for recording entries of the bets made by persons frequenting a place is an instrument of gaming within the definition of that term in section 3 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887)

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* Criminal Application for Revision No 250 of 1915

† The material portion of the section runs as follows —

In this Act the expression instruments of gaming includes any article used as a subject or means of gaming

Emperor v *Lakhamsi* (1) followed

THIS was an application in revision against conviction and sentence passed by Frank Oliveira, Third Presidency Magistrate of Bombay

The facts were that the accused was charged with keeping a common gaming house, an offence punishable under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) The evidence adduced at the trial showed that the room, occupied by the accused, was used for making *teji mandi* bets on the number of bales of cotton expected to be sold on a particular day at Liverpool The room, when raided by the Police, had no instruments of gaming It only contained a book, called the green book in the case which was used for recording bets made or accepted by persons frequenting the room Some of the entries in it, ran as follows —"10-11½ Mohan Jutha, 10 71 Kukal 0-8 0 5-12½ Mohan Jutha"

The trying Magistrate held that the book in question was an instrument of gaming, convicted the accused of the offence charged and sentenced him to undergo rigorous imprisonment for one month

The accused applied to the High Court

Jinnah with *T R Desai* for the applicant—The book cannot be treated as an instrument of gaming The expression "instrument of gaming' has been defined in section 3 of the Bombay Prevention of Gambling Act 1887 as including "any article used as a means of gaming' To come within the definition the article must have been actually used for the purpose of enabling the gambler to gamble The moment a bet is laid and is accepted the transaction is complete and the gaming is over The subsequent recording of the result of the bet is no part of gaming at all It played

(1) (1904) 29 Bom 261

no part in wager and cannot constitute wager If no record were made the gaming would be complete all the same

Refers to *Queen-Empress* v *Narottamdas Motiram* [1] *Emperor* v *Jesang Motilal* [2], *Queen-Empress* v *Kanji Bhimji* [3] *Emperor* v *Lakhamsi* [4] and *Emperor* v *Tribhovandas* [5]

Bahadurji acting Advocate General, with *E F Nicholson* Public Prosecutor for the Crown was not called upon

BATCHELOR J —In this case the applicant Manilal Mangalji has been convicted by the learned Third Presidency Magistrate of managing or assisting in conducting the business of a common gaming house under section 4 of the Bombay Prevention of Gambling Act, IV of 1887, and has been sentenced to one month s rigorous imprisonment

The only point of law urged by the learned counsel for the applicant is that a certain green book, in which were recorded entries of the bets made by those frequenting the room managed by the applicant, is not an instrument of gaming within the definition of that term in section 3 of the Act Unfortunately, however, for this argument, a Bench of this Court has decided against it in the case of *Emperor* v *Lakhamsi*[6] which followed the decision in *Emperor* v *Tribhovandas*[5] where the judgment of Mr Justice Fulton was presumably specially relied upon We are bound by the decision in *Emperor* v *Lakhamsi*[6] unless we are prepared to refer the matter to a Full Bench That I am not prepared to do, though I recognize that in view of the divergence of judicial opinion to which this topic has

(1) (1889) 13 Bom 681
(2) (1915) 17 Bom L R 600
(3) (1892) 17 Bom 184
(4) (1904) 29 Bom 264
(5) (1902) 26 Bom 533
(6) (1904) 29 Bom 264

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given rise, my own view must be expressed with diffidence. Speaking for myself, then, I agree with the decision in *Emperor v. Lakhamsi*[1]. It is to be observed that the definition in section 3 of the Act is an inclusive definition, the words reading that the "expression 'instruments of gaming' includes any article used as a subject or means of gaming." The whole argument has turned—and I think rightly turned—upon the correct signification of the word 'means' in this definition. Now as there is nothing to the contrary in the Act, it is clear that the word 'means,' which is a popular word and not a term of art, must be construed in its popular sense, that is to say, in the sense in which the word would have been understood amongst ordinary Englishmen the day after the statute was passed: see *Reg. v. Commissioners of Income Tax*[2] which was affirmed in *Commissioners for Special Purposes of Income Tax v. Pemsel*[3] and *The Fusilier*[4] where Dr. Lushington said 'one of the rules of construing statutes and a wise rule too, is, that they shall be construed *uti loquitur vulgus*, that is, according to the common understanding and acceptation of the terms.' So far as I am able to understand the current usage of this ordinary word 'means,' I should say, having regard particularly to the inclusive character of the definition which we are interpreting that it must include a thing or article such as this green book which was specially contrived and used to promote and facilitate the wagering. I say it was specially contrived and used for this purpose because in fact it contains nothing but pencilled memoranda of the wagers made. Mr. Jinnah has contended that the wagering might conceivably have been carried on without the assistance of a book to record the wagers, and that no doubt is so. But the question is when

[1] (1904) 29 Bom. 264.
[2] (1888) 22 Q. B. D. 296.
[3] [1891] A. C. 531.
[4] (1864) 34 L. J. P. M. & A. 25.

a book is in fact used so as to record the wagers, what is the position of that book? Is it or is not a 'means of wagering within the definition? In our present case, as it appears to me, the reasonable inference is that it was found by those engaged in this wagering that the wagering could not conveniently be conducted otherwise than with or, I think I may say, by means of this green book: in other words, it was found desirable to maintain this book as a method or, I think, a means of carrying on the wagering which without it could not have been carried on without great or insuperable difficulties.

For these reasons though I am sensible of the difficulty created by the divergent view expressed by other single Judges in *Queen-Empress* v. *Kanji Bhimji*[1] and *Emperor* v. *Jesang Motilal*[2] it is my opinion that the case of *Emperor* v. *Lakhamsi*[3] was correctly decided, and that we ought now to follow it and hold that the green book in the case before us was a 'means' or instrument of gaming within the definition in the Act.

That being so, the conviction in this case must be affirmed and though Mr. Jinnah has addressed us on the question of sentence, I see no reason whatever to suppose that the sentence in this case was one whit too severe.

I would therefore discharge the rule.

HAYWARD, J.—The applicant used the green book now before us in his room kept for registering *Teji Mandi* wagers on the results of the cotton sales in Liverpool, and he has in consequence, been convicted of keeping a common gaming house under section 4 of the Bombay Prevention of Gambling Act. It has not been

(1) (1892) 17 Bom. 184. (2) (1915) 17 Bom. L. R. 600.
(3) (1904) 29 Bom. 264.

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EMPEROR v. MANILAL MANGALJI

disputed on behalf of the applicant that he so used the green book But it has been contended that the green book so used was not an instrument of gaming and that, therefore, the applicant was not legally guilty of keeping a common gaming house under the Act

Now it appears that the original legislative prohibition was directed merely against gaming, in the ordinary sense of the word, that is to say, against playing for stakes or betting at sports or pastimes as was pointed out in the rain betting case of 1889, *Queen Empress* v *Narottamdas Motiram*(1) Thereafter the prohibition was extended to include betting on other events under the term "wagering" by the insertion of these definitions "In this Act the expression 'instruments of gaming' includes any article used as a subject or means of gaming', and "In this Act the word 'gaming,' whenever it occurs, shall include wagering ' by the Amending Act of 1890 The question, therefore, which we have to decide is, whether the green book before us was used as a 'means' of 'gaming,' or rather to substitute the word which we must substitute under the definition as a 'means' of wagering ' It seems to me that the green book would in ordinary language, be said to have been used as a means of carrying on this particular form of wagering It is difficult to believe in the circumstances disclosed that any persons would without some such record have been induced to enter into these wagering transactions Whether that is a correct interpretation or not, has, however been laid open to doubt by the *dicta* on former occasions of certain of the Judges of the Benches of this Court Those *dicta* therefore require careful consideration In *Queen Empress* v *Kanji Bhimji*(2), decided soon after the Amendment Act while Parsons J held that it was a question of fact for

(1) (1889) 13 Bom 681 (2) (1892) 17 Bom 184

determination in each case whether account books were instruments of wagering Telang J doubted whether they could ever be instruments of wagering He considered that they were too remotely connected with wagering and were merely helps to the preservation of evidence relating to the completed wagering transaction In the Opium Sales Case *Emperor v Tribhovandas*[1] while Fulton J was of opinion that the account books used to record the wagers were, on that account alone, used as a ' means of wagering Candy J held that these were so used as they were especially contrived and were not merely helps to the preservation of evidence of the wagering transactions In the Teji Mandi case *Emperor v Lakhamsi*,[2] both Judges concurred that even slips of paper used to record the wagers were, no less than account books used as a 'means' of wagering But in the most recent case, *Emperor v Jesang Motilal*[3], Beaman J doubted whether such slips of papers or account books could ever be instruments of wagering It appears, however, that Macleod J was not prepared to share his doubts, and those doubts were not acted upon so that there was no decision upon the matter by the Bench

It appears, therefore that the interpretation which has commended itself to us as the plain meaning of the language used is the interpretation approved by the only previous decision directly in point which can be regarded as a binding decision of a Bench of this Court We ought, therefore to discharge this rule and confirm the conviction The sentence of one month's rigorous imprisonment is, further, not unduly severe in the case of a keeper of a common gaming house, the suppression of which is the special object of these Acts of the Legislature

Rule discharged

R R

[1] (1902) 26 Bom 533 [2] (1904) 29 Bom 264
[3] (1915) 17 Bom L R 600 at p 602

PRIVY COUNCIL *

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NAGINDAS BHAGWANDAS (PLAINTIFF) v BACHOO HURKISSONDAS (DEFENDANT)

[On appeal from the High Court of Judicature at Bombay]

Hindu law—Partition—Shares of adopted son in joint Hindu family and natural born son of another father—Construction of Dattaka Chandrika section 5 paragraphs 24 and 25—Position of adopted son in joint Hindu family

A Hindu joint family in Bombay governed by the Mitakshara law as altered or interpreted by the Vyavahara Mayukha consisted of two sons H and B. H died in September 1900 leaving a widow who was then pregnant. B died on 17th December of the same year leaving a widow to whom he gave authority to adopt. On 18th December the widow of H gave birth to a son the respondent and in February 1901 the widow of B adopted the appellant as a son to her husband. In a suit for partition by the appellant against the respondent

Held (reversing the decision of the appellate High Court and restoring that of the Trial Judge of the same Court) that on the construction of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika the adopted son was entitled to a share equal to the share of the natural born son. The doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only to cases in which the competition is between an adopted son and a subsequently born natural son of the same father

Raghubanund Doss v *Sadhu Churn Doss*(1) dissented from

Tara Mohun Bhuttacharjee v *Kripa Moyee Debia*(2) and *Dinonath Mukerji* v *Gopal Churn Mukerji*(3) followed

As so construed paragraphs 24 and 25 of section 5 of the Dattaka Chandrika are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha and they are consistent with the reference to the text of Vasistha in paragraph 1 section 10 of the Dattaka Mimansa

* *Present* —Viscount Haldane Lord Parmoor Lord Wrenbury Sir John Edge and Mr Ameer Ali

(1) (1878) 4 Cal 425 (2) (1868) 9 W R 423
(3) (1881) 8 Cal L R 57

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An adopted son occupies the same position in the family of the adopter as a natural born son except in a few instances which are accurately defined in the Dattaka Chandrika and the Dattaka Mimansa and relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father

Sumboo Chunder Chowdry v *Naraini Dibeh*[1], *Pudma Coomari Debi* v *Court of Wards*[2] and *Kali Komul Mozumdar* v *Uma Sunker Moitra*[3] followed

The position of an adopted son in the family cannot now be decided by reference to the place which was assigned by Manu to the twelve then possible sons of a Hindu who whatever their rights may have been then are long since obsolete

APPEAL 16 of 1915 from a decree (2nd February 1914) of the High Court at Bombay in its Appellate Jurisdiction, which varied the decree (13th November 1913) of a Judge of the same Court in the exercise of its Ordinary Original Civil Jurisdiction

The suit giving rise to this appeal was brought by the appellant for partition between himself and the respondent of certain joint ancestral property in which he and the respondent were the only males interested

The parties were Gujerathi Hindus governed by the Mitakshara and Mayukha, and the only question in the appeal was whether the appellant (as a member of the joint family by adoption) took on partition a share equal to that of the respondent (a member by birth), or a reduced share which according to the Bombay authorities was one-fourth of the share of the respondent Nagindas Shobhagdas, the grandfather of both parties, was in possession of the property in question, and died many years ago leaving two sons Bhagwandas and Hurkissondas, members of the joint and undivided family Hurkissondas died on 14th September 1900, leaving

[1] (1835) 3 Knapp 55
[2] (1881) 8 Cal. 302 L R. 8 I A. 229
[3] (1883) 10 Cal. 232 L. R. 10 I A. 138

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only his widow Gungabai, who was then pregnant. Bhugwandas died on 17th December of the same year, leaving one daughter, Navalbai, and his widow, Mankorebai, to whom he gave express authority to adopt. On 18th December 1900 Gungabai gave birth to a posthumous son, the present respondent, and on 17th February 1901 Mankorebai adopted the appellant.

The validity of that adoption was contested on behalf of respondent by litigation in which the status of the appellant as the adopted son of Bhugwandas was finally established in the case of *Bachoo* v. *Mankorebai*[1] on appeal to the Privy Council.

The appellant on attaining his majority brought the present suit against the respondent and the two widows contending that on a partition, per stirpes, between brothers' sons he was on partition entitled to the full share that his father would have taken, that is, one half. The main contention of the respondent was that the appellant being the adopted son, and not the natural son of Bhugwandas, was not entitled to a half share, but only to a reduced share of one fifth.

The suit was tried by Macleod J. who held that a text of the Dattaka Chandrika (section 5, paragraphs 21, 25) on which the respondent relied, did not apply to a case of partition of joint family property under the Mitakshara law, but only to cases of succession by inheritance to the estate of a deceased person, and he therefore refused to follow a decision of the Calcutta High Court in *Raghubanund Doss* v. *Sadhu Churn Doss*[2] which was opposed to that view. He was further of opinion that on such a partition there was a primary division per stirpes irrespective of the quality or quantity of the members of the stirpes, and that it was only when the

(1) (1907) 31 Bom. 373; L. R. 34 I. A. 107.

(2) (1878) 4 Cal. 425.

secondary division per capita took place that an adopted son took a reduced share. He therefore held that the appellant was entitled to share equally with the respondent, and made a decree for partition on that footing.

An appeal by the respondent from that decision was heard by Sir Basil Scott C. J. and Batchelor J. who were of opinion that the passage in the Dattaka Chandrika applied to the case of a partition such as that before them and was binding on the parties unless it was inconsistent with the law as stated in the Mitakshara. After an examination of the passages relating to the subject in the Mitakshara they considered that the passage in the Dattaka Chandrika so far from being inconsistent with the Mitakshara, was in accordance with its doctrines and principles and was in fact a correct interpretation of them. They also pointed out that the text from which Macleod J. appeared to have taken his view of the primary and secondary divisions on a partition, had reference to the number of sharers, not to their quality, and did not lay down that they must take as much as their father irrespective of their own status. They agreed with the decision in *Raghubanund Doss* v. *Sadhu Churn Doss*,[1] and held that the appellant was only entitled on partition to a one-fifth share, and varied the decree of the first Court accordingly.[2]

On this appeal,

Sir R. Finlay K. C., *De Gruyther K. C.* and *A. M. Dunne* for the appellant contended that on a partition (per stirpes) between brothers' sons he was entitled to the full share that his father would have taken of the joint ancestral property, namely, a one-half share

(1) (1878) 4 Cal. 425.

(2) The judgment of the High Court appealed from will be found in (1914) 16 Bom. L. R. 263.

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The only case in which an adopted son takes a less share than a natural son is where both are sons of the same father, and the natural son has been born to him after the adoption. In that case the adopted son would had there been no natural son, or on the death of the natural son, have taken the whole. But that would not be so in any case except where the father of the natural son and the adopted son is the same. The rule on which the respondent's contention rested was the text of Vasistha, section 15, verse 9, "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," suggests no extension of it to collateral succession, and the addition to it in the Dattaka Mimansa, section 10, verse 1, "on the death of the natural son, the adopted son is entitled to the whole" shows that the rule was not intended to apply where the partition was between a natural born son, and an adopted son, who were sons of different fathers. Such an extension was inconsistent with the Mitakshara, Chapter I, section 5, in dealing with the shares of grandsons, where the primary division per stirpes is made irrespective of the number or quality of the members of the stirpe and Chapter I, section 11 dealing with the rights of sons according to their respective quality. The word 'son" there did not include "grandson" for the purpose of extending the rule to succession among collaterals. From the Mayukha, a commentary of great authority in Bombay, the respondent's contention derived no support: see Mayukha Chapter IV, section 5, verses 21, 24, 25, and Dayabhaga Chapter XI, section 13 verse 10. That contention rested upon the Dattaka Chandrika section 5 paragraphs 21, 25 and on the construction put upon those texts in the case of *Raghubanund Doss* v *Sadhu Churn Doss*[1], which was, it was submitted, wrongly decided

[1] (1878) 4 Cal. 425

Even with the addition of the words which it was insisted in that case should be inserted in Mr Sutherland's translation, paragraph 24 and the first part of paragraph 25 appear rather to support the view contended for by the appellant. Reference was made to Mayne's Hindu Law 8th Edn page 230, paras 168, 169, 170. This view is also consistent with the translation[1] which the parties agreed to in the lower Courts. Of the decided cases that of *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*[2] is in favour of the appellant's contention and it has been followed in *Dinonath Mukerji* v. *Gopal Churn Mukerji*[3] where *Raghubanund Doss* v. *Sadhu Churn Doss*[4] was distinguished. In *Raja* v. *Subbaraya*,[5] and *Baramanund Mahanti* v. *Chowdhry Krishna Charan Patnaik*[6], the decision in *Raghubanund Doss* v. *Sadhu Churn Doss*[4] was doubted. The respondent's contention was properly rejected by Macleod J as being in conflict with the Mitakshara: reference was made to *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[7], *Bhagwan Singh* v. *Bhagwan Singh*[8], and *Puttu Lal* v. *Parbati Kunwar*[9]. It was decided in *Kali Komul Mozumdar* v. *Uma Sunker Moitra*[10], that an adopted son occupies the same position and has the same rights as a natural son, and no reason has been shown for giving him, under the circumstances of this case, a reduced share on partition. Mayne's Hindu Law, 8th Edn, page 230, paras 164, 166, and page 731, para 504 was also referred to.

(1) This is set out in the judgment of the Judicial Committee.

(2) (1868) 9 W R 423 at p 425.

(3) (1881) 8 Cal L R 57.

(4) (1878) 4 Cal 425.

(5) (1883) 7 Mad 253.

(6) (1884) 14 C L J 183 at p 187.

(7) (1899) 22 Mad 398; L R 26 I A 113.

(8) (1899) 21 All 412; L R 26 I A 153.

(9) (1915) 37 All 359; L R 42 I A 155.

(10) (1883) 10 Cal 232; L R 10 I A 138.

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J A Clyde, K C and *E B Raikes* for the respondent contended that the proper partition in this case was that prescribed in section 5, paras 24 and 25 of the Dattaka Chandrika which, it was submitted, was in accordance with the doctrine of the Mitakshara and the Mayukha An adopted son is not in the same position as a natural son in the joint family, except so far as he is put in the same position by special texts, the texts referred to do not put him in the same position Members of a joint family have not all equal rights Mayne's Hindu Law, 8th Edn, page 664, para 447, Mitakshara, Chap I, section 11, page 410 of Stokes' Hindu Law Books An adopted member of a joint family always takes, on partition with a natural born member, a quarter share That it was contended, was the meaning of the passage cited according to the translation admitted by the parties, and according to Sarkar's Law of Adoption, page 399 note, it was the meaning of Sutherland's translation when the omissions were supplied and the glosses admitted The first seven sections of Chapter I of the Mitakshara are confined to the rights of the natural born sons (aurasa), of the same caste (savarna), and the rule in section 5, verses 1 and 2, on which the appellant relies, is not only merely a restrictive rule, which does not confer any right, but it is expressly confined to the natural born son, the word "utpadana" (procreation) being used regarding him in those verses Section 7 deals with natural sons not "savarna," and to them a reduced share is assigned, and this whether they share as sons grandsons or great-grandsons In section 11 the secondary sons are enumerated, and the rule of Yajnavalkya is stated according to which each class only shares if the higher classes are absent In mitigation of this rule the author introduces the texts of Vasistha and Katyayana, and gives his interpretation of them, and it is not the texts but Vijnanesvara's

interpretation of them which is the Mitakshara law see *Collector of Madura* v *Moottoo Ramalinga Sathupathy*[1] Paragraph 26 says that all the secondary sons of the same caste, and particularly the son of the wife,' take a quarter share but that son can only share with his uncles or cousins for the circumstances of his case he cannot have a brother It was submitted, therefore, (*a*) that Vasistha's and Katyayana's exceptions, at any rate as introduced into the Mitakshara, were enabling exceptions giving the adopted son, and other secondary sons a right to share where they co exist with natural sons, and (*b*) that those exceptions whether enabling or disabling were continued by Vijnaneswara as applying to every partition in a joint family The reason for reducing the share was it was submitted, the inferiority of the adopted member whether on the test of consanguinity (of which he has of course none) or sacrificial efficacy in which he is inferior to the natural born member see Mitakshara, Chap I, section 11, verse 21, the table of Nirnaya Sindhu, the great Mahratta authority at page 123 of Sarvadhikari's Hindu Law of Inheritance, and the Dattaka Chandrika, section 3, verses 1—3 The natural born member offers oblations to three generations of ancestors and the adopted member only to one, if there are any born members in the family

The construction of the passages in the Dattaka Chandrika which the respondent contends for was allowed in *Raghubanund Doss* v *Sadhu Churn Doss*[2] and to get rid of that case the appellant suggests that the last part of paragraph 24 and the whole of paragraph 25 are directed to proving only that the adopted son of an adopted son cannot take more than his father would have taken a proposition which no one could

(1) (1868) 12 Moo I A 397 at p 435
(2) (1878) 4 Cal 425

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dispute Mr Mayne after labouring this construction postulates, of course, rightly but without any authority that neither can the natural son of an adopted son take more than his father would have done which is a much bolder proposition The respondent's interpretation on the contrary, makes the author refute the following plausible but fallacious argument, that, as the grandson succeeds to the share appropriate to his father, and as the share appropriate to the father of an adopted grand son (if natural born) is a full share, therefore the adopted son of a natural son takes a full share The fallacy is that the first proposition of the suggested argument is, as the Dattaka Chandrika points out, a restrictive (and not an enabling) rule, and after indicating the impropriety which would result if it were enabling the author explains that it is only true if the words "the share appropriate for his father" are qualified by the addition of the words, "if he had been of the same description" (that is adopted or natural) "as himself" The author then links this up with the first statement of the proposition in passage in para 24 (omitted by Sutherland) and finishes the subject by stating that the same rule applies to the great grandson, that is the exact limit of the coparcenary system The last sentence in para 25 is an answer to the appellant's contention that the rule is not intended to apply to a partition in a Mitakshara family, and so is para 30 which in terms refers to a partition during the father's life

All the criticisms of the decision in *Raghubanund Doss v Sadhu Churn Doss*[1] have been *obiter dicta* in cases where the point now in question did not arise for consideration *Tara Mohun Bhuttacharjee v Kripa Moyee Debia*[2] was decided on the translation of Sutherland with the material passage omitted, and

[1] (1878) 4 Cal 425 [2] (1868) 9 W R 423

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relates only to collateral succession *Dinonath Mukerji v Gopal Churn Mukerji*[1], though it followed *Tara Mohun Bhuttacharjee v Kripa Moyee Debia*[2] as to collateral succession, contains a dictum at page 62 of the report directly in favour of the respondent The decision of this Board in *Pudma Coomari Debi v Court of Wards*[3] and *Kali Komul Mozumdar v Uma Sunker Moitra*[4], adopt the reasoning and conclusion of Mitter J in the High Court in former case[5] but he mentions as one of the exceptions the very text of Yajnavalkya on which the respondent relies (Mitakshara Chap I, section 11 verse 21) citing it with the addition (not found in the Mitakshara) "otherwise" that is, except that he does not share or present funeral oblations with the natural born or other superior sons, 'the adopted son in every respect resembles the legitimate son ' Reference was also made to West and Buhler, pages 10, 23 , Mayne's Hindu Law, 8th Edn , page 227, para 170, as to paragraphs 24 and 25 of Dattaka Chandrika, 2 Macnaghten's Hindu Law, 89 Mayne's Hindu Law, 8th Edn pages 339, 340, as to the vested interest a member of a joint Hindu family (Mitakshara law) takes in the joint property Mayne s Hindu Law, 8th Edn , page 342, para 271 West and Buhler, page 598 , and *Waman Raghupati Bova v Krishnaji Kashiraj Bova*[6]

Sir R Finlay K C replied —In this case the adopted son was not adopted until after the birth of the natural son , whilst the whole argument for the respondent has been with regard to a case where the natural son has been born after the adopted son had been adopted Reference was made to *Suraj Bunsi Koer* v

(1) (1881) 8 Cal L R 57 (2) (1868) 9 W R 423
(3) (1881) 8 Cal 302 L R 8 I A 229
(4) (1883) 10 Cal 232 L R 10 I A 138
(5) (1879) 5 Cal 615 at p 623 (6) (1889) 14 Bom. 249 at p 259

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Sheo Persad Singh[1] per Sir J Colvile, Dattaka Mimansa, Chap II, para 64, Mitakshara, Chap I, section 11, verses 12, 30, 31, *Sumboo Chunder Choudry* v *Narain Dibeh*[2], *Pudma Coomari Debi* v *Court of Wards*[3], and the same case in the High Court *Puddo Kumaree Debee* v *Juggut Kishore Acharjee*[4], *Kali Komul Mozumdar* v *Uma Sunker Moitra*[5], and the same case in the High Court *Uma Sunker Moitro* v *Kali Komul Mozumdar*[6], and *Ramchandra Martand Waikar* v *Vinayek Venkatesh Kothekar*[7]

1915, November 26th —The judgment of their Lordships was delivered by

SIR JOHN EDGE —The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujerathi Hindus, of which the plaintiff by adoption and the defendant by birth are the male members The question in this appeal is one as to the share in the joint family property to which the plaintiff is on partition entitled

The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893 Hurkissondas Nagardas died on the 14th September 1900, leaving his wife surviving, she was then pregnant, and the defendant, who was the posthumous child was born on the 18th December 1900 Bhugwandas Nagardas died childless on the 17th

(1) (1879) 5 Cal 148 at pp 164 165 L R 6 I A 88 at pp 99 100

(2) (1835) 3 Knapp 55

(3) (1881) 8 Cal 302 L R 8 I A 229

(4) (1879) 5 Cal 615

(5) (1883) 10 Cal 232 L R 10 I A 138

(6) (1880) 6 Cal. 256

(7) (1914) 42 Cal 384 L R. 41 I A. 290

December 1900, leaving his widow surviving him, he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the plaintiff as a son to her deceased husband The parties are governed by the Mitakshara, as altered or interpreted by the Vyavahara Mayukha The plaintiff claimed that he was entitled on partition to a moiety of the family property On the other hand the defendant contended that the plaintiff, as an adopted son, was entitled to a reduced share only of the family property, in support of that contention the defendant relied upon paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep JJ in *Raghubanund Doss* v *Sadhu Churn Doss* [1]

This suit was tried in the High Court at Bombay by Macleod J, who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural born son of the same father (which is not the case here), and he gave the plaintiff a decree for an equal share From that decree the defendant appealed

On appeal Sir Basil Scott C J and Batchelor J holding, as their Lordships understand their judgment, that there is nothing in the Mitakshara which is inconsistent with paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as these paragraphs were construed by Markby and Prinsep JJ in *Raghubanund Doss* v *Sadhu Churn Doss* [1] adopted the construction of Markby and Prinsep JJ of those paragraphs, and decided that the plaintiff as an adopted son was on partition entitled only to a reduced share in the family

(1) (1878) 4 Cal 425

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property From their decree this appeal has been brought

The learned Judges of the High Court on the appeal from Macleod J in this suit had before them Sutherland's translation of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika, the translation of those paragraphs which was relied upon by Markby and Prinsep JJ in *Raghubanund Doss v Sadhu Churn Doss*,[1] and a translation made by Sir Ramkrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit Sutherland's translation was not a complete translation of the Sanskrit text The translation which was relied upon by Markby and Prinsep JJ in *Raghubanund Doss v Sadhu Churn Doss*[1] and is apparently accepted as a correct translation by Mr Mayne in paragraph 169 of his Hindu Law and Usage, is as follows —

> Paragraph 24 — Therefore by the same relationship of brother and so forth in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman the adopted son of the same description obtains his due share And in the event of the ancestor having other sons a grandson by adoption whose father is dead obtains the share of an adopted son. Where such son may not exist the adopted son takes the whole estate even.

> Paragraph 25 — Since it is a restrictive rule that a grandson succeed to the appropriate share of his own father the son given where his adopter is the real legitimate son of the paternal grandfather is entitled to an equal share even with a paternal uncle who is also such description of son therefore a grandson who is an adopted son may (in all cases) inherit an equal share even with an uncle This must not be alleged (as a general rule) For there would be this discrepancy where the father of the grandson were an adopted son he would receive a fourth share but the grandson if he were such a son (of him) would receive an equal share (with an uncle in the heritage of the grandfather) And accordingly whatever share may be established by law for a father of the same description as himself to such appropriate share of his father does the individual in question (even the adopted son of one adopted) succeed Thus what had been advanced only is correct The same rule is to be applied by inference to the great-grandson also

(1) (1878) 4 Cal 425

The translation which was made by Sir Ramkrishna Bhandarkar is as follows —

It should be understood by this that an adopted son acquires the ownership wherever possible of his proper share by a relation similar to the relation brotherhood &c by which a natural born son acquires a right to the property of his brothers &c Similarly an adoptive grandson whose adopting father is dead acquires the ownership of the share proper for an adopted (son) when the owner of the property has got another son or other sons and of the whole when he has got no son or sons It should not be argued that because a grandson is necessarily the owner of the share proper for his father the taker (in adoption) of the adoptive son being a natural born son of the grand father and entitled to a share equal to that of the uncle similarly born the adoptive grandson should take a share equal to that of the uncle for it involves impropriety inasmuch as the adopted son gets one fourth and the adoptive grandson an equal share Therefore that share is proper for a son's father which he would get by law if he were of the same description (adopted or natural born) as the son This way should be followed in the case of great grandsons also

Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the Dattaka Chandrika other than that at which their Lordships have arrived

The author of the Dattaka Chandrika was in paragraphs 24 and 25 of section 5 of his commentary, relying upon the text of Vasistha according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part" The text of Vasistha is quoted by Nanda Pandita in paragraph 1 of section 10 of the Dattaka Mimansa, who added, "on the death of him (the naturally-born son) he (the adopted son) is entitled to the whole" It is obvious that Vasistha and Nanda Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to

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cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally-born son of a brother or a nephew of the adoptive father

The author of the Dattaka Chandrika expressed his views somewhat obscurely and confusedly in paragraphs 24 and 25 of section 5 of his commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was For the purposes of his commentary he paraphrased the text of Vasistha that "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part,' and in paragraphs 24 and 25 of section 5 he illustrated the text of Vasistha, as he understood that text, by examples of its application

His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son The author of the Dattaka Chandrika, applying the well established rule of Hindu law that a son takes no greater share than his father if a qualified person would have been entitled to, illustrated the application of the principle of the text of Vasistha by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive father's adoptive father, in other words his uncle

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through the adoption of his adoptive father. In the first case, as the author of the Dattaka Chandrika pointed out the adopted son would take a share equal to that of his uncle by adoption: in the latter case, as a son cannot take a greater share than his father would have been entitled to the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally-born member of the family, and who would have taken a greater share than his brother by adoption.

As their Lordships construe paragraphs 24 and 25 of section 5 of the Dattaka Chandrika those paragraphs are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha and they are consistent with the reference to the text of Vasistha in paragraph 1 of section 10 of the Dattaka Mimansa. To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss*[1], would bring them into conflict with what are now well established principles of Hindu law. The attention of Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss*[1], which was decided by them in 1878 does not appear to have been drawn to the case of *Tara Mohun Buttacharjee* v. *Kripa Moyee Debia*[2] which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse JJ. held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral relative of his adoptive father. In *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*[2] the plaintiff by birth and the defendant by adoption were in equal relationship to the deceased collateral: their respective grand fathers were the first cousins of

(1) (1878) 4 Cal. 425. (2) (1868) 9 W. R. 423.

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the collateral and their respective fathers were his first cousins once removed Loch and Hobhouse JJ were pressed in argument to put a construction upon paragraph 25 of section 5 of the Dattaka Chandrika adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of the body legitimately begotten, where there is no such son subsequently born, and that there was no reason why the plaintiff and the defendant in the suit before them should not each take the share to which their respective fathers were entitled The parties to the suit which was in appeal before Loch and Hobhouse JJ were governed by the law of the Dayabhaga, but that fact does not distinguish that case in principle from the case which is now before this Board The decision in *Tara Mohun Bhuttacharjee* v *Kripa Moyee Debia* [1] was followed in 1881 by McDonell and Field JJ in *Dinonath Mukerji* v *Gopal Churn Mukerji* [2] In *Raja* v *Subbaraya* [3] which was, however, a case relating to Sudras, Sir Charles Turner C J and Muttusami Ayyar J in 1883 doubted that paragraph 25 of section 5 of the Dattaka Chandrika had been correctly construed in *Raghubanund Doss* v *Sadhu Churn Doss* [4] Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep JJ of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika has been adopted

In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the defendant that the position of a member by adoption in a joint Hindu family, and his interest in the joint family property

(1) (1868) 9 W R 423
(2) (1881) 8 Cal L R 57
(3) (1883) 7 Mad. 253
(4) (1878) 4 Cal. 425

are inferior to the position and interest ... birth of the family, and it was suggested ... ed son does not on his adoption ... in the joint family property. It was ... establish that proposition by reference ... which was assigned by Manu and other ... to the twelve then possible sons of ... this contention it is sufficient to ... may have been the position and rights ... selves of such twelve sons in very ... these twelve sons, except the legitimate ... the adopted, are long since obsolete. A ... to their rights and interests, even if they ... ascertained, would be beside the point ... no light on the construction of paragraph ... section 5 of the Dattaka Chandrika or ... tion and rights of an adopted son. H... customs have not stood still, and ... concerned with is the position at the pr... an adopted son in a Hindu family. A... this Board in *Sumboo Chunder Choudry* v *Naraini Dibeh* [1] considered that according to Hindu ... adopted son becomes for all purpo... father by adoption. This Board in ... *Coomari Debi* v *Court of Wards* ... the decision of this Board in *Sumboo Chunder Choudry* v *Naraini Dibeh* [1] and held that ... succeeds not only lineally, but coll... inheritance of his relations by adoptio... an adopted son occupies the same positio... of the adopter as a natural born son, ... instances which are accurately defined ... Dattaka Chandrika and the Datt...

(1) (1835) 3 Knapp 55

(2) (1881) 8 Cal 302 L R 8 I A ...

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Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father To the same effect is the decision of this Board in *Kali Komul Mozumdar v Uma Sunker Moitra* (1) In the last mentioned case when it was before the Full Bench of the High Court at Calcutta (2) Romesh Chunder Mitter, J, held that—

> According to Hindu law an adopted son occupies the same position and has the same rights and privileges in the family of the adopter as the legitimate son except in a few specified instances which have been clearly and carefully noted and defined by writers on the subject of adoption The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born both in respect to the paternal and the maternal line and his complete substitution into the adopter's family as if he were born in it

With that statement as to the Hindu law of adoption their Lordships agree

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside and the decree of Mr Justice Macleod should be restored

The respondent must pay the costs of this appeal and of the appeal in the High Court

Solicitors for the appellant —Messrs *Hughes & Sons*

Solicitors for the respondent —Messrs *Latteys & Hart*

Appeal allowed

J V W

(1) (1883) 10 Cal 232 L R 10 I A 138

(2) (1880) 6 Cal 256 at pp 259 260

PRIVY COUNCIL *

JAMSHED KHODARAM IRANI (PLAINTIFF) v. BURJORJI DHUNJIBHAI (DEFENDANT)

[On appeal from the High Court of Judicature at Bombay]

P C *
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November 11 12 15 16
December 6

Contract Act (IX of 1872) section 55—When time may be considered of the essence of a contract—Where intention to make time of essence of contract is not specifically expressed in unmistakeable terms—Rule of equity to disregard letter of contract and take contract substantially as meaning completion of it within reasonable time—What takes place prior to signing of contract but nothing that takes place afterwards to be looked at in judging of intention

By an agreement dated 9th July 1911 the defendant (respondent) agreed to sell his interest in certain land which he held on lease from the Secretary of State for India to the plaintiff (appellant) for Rs 85 000 of which Rs 4 000 was paid on execution of the agreement and it was agreed that the title was to be made marketable and that Rs 80 500 should be paid on the execution of the deed of sale which was to be prepared and received within two months from the date of the agreement and Rs 500 on the transfer of the land after the conveyance should have been registered, and there was a clause to the effect that if the purchaser did not pay the amount of the purchase money within the fixed period he should forfeit his right to the earnest money and the vendor should be at liberty to resell the property On 3rd October 1911 requisitions as to title were made by the appellant The respondent did not comply with the requisitions but on 6th October he asserted a right to put an end to the contract on the ground that time was of its essence and claimed to be entitled to the deposit of Rs 4 000 as the appellant had failed to complete his purchase within the time fixed In a suit for specific performance

Held (reversing the appellate judgment of the High Court) that time was not of the essence of the contract

Section 55 of the Contract Act (IX of 1872) did not lay down any principle which differed from those that obtained as regards contracts for the sale of land by which equity in such a case looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place really intended no more than that it should take place within a reasonable time

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* *Present* —Viscount Haldane Lord Parmoor Lord Wrenbury Sir John Edge and Mr Ameer Ali

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v
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Lennon v *Napper* (1) *Roberts* v *Berry* (2), *Tilley* v *Thomas* (3) and *Stickney* v *Keeble* (4) referred to as laying down the doctrine adopted by and embodied in section 55 in reference to sales of land

The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to it are to be taken as having really in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation that time is intended to be of the essence of the contract Equity will also infer an intention that time should be of the essence of a contract from what has passed between the parties prior to the signing of the contract the construction of which cannot in the contemplation of equity be affected by what takes place after it has once been entered into

Held therefore that there was nothing in the language of the agreement or the subject matter to displace the presumption that for the purpose of specific performance time was not of the essence of the bargain The subject matter or the character of the lease sold were not such as to take the case out of the class to which the principle of equity applies The appellant did not bind himself by his correspondence subsequent to the agreement to a new agreement that time if it was not originally of the essence should be made so As to the language of the agreement itself their Lordships agreed with the view of the Trial Judge that there was nothing said in it sufficient to exclude the equitable canon of interpretation and with his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence

APPEAL 113 of 1914 from a judgment and decree (17th February 1913) of the High Court at Bombay in its Appellate Jurisdiction, which reversed a judgment and decree (30th July 1912) of the same Court in the exercise of its Original Civil Jurisdiction

The suit in which the above decrees were passed was one for specific performance by the respondent of a contract for the sale of land to the appellant, or in the alternative for the return of the earnest money, and for damages The defence was that the contract had become voidable under section 55 of the Indian Contract

(1) (1802) 2 Sch. & Lef 682

(2) (1853) 3 De. G M & G 284 at p 289

(3) (1867) L R 3 Ch 61

(4) [1915] A C 386

Act (IX of 1872) by reason of the failure of the appellant to perform his part by the time specified, and had been avoided by the respondent

In the first Court Mr Justice Macleod held that time was not of the essence of the contract

On appeal Sir Basil Scott C J and Mr Justice Chandavarkar reversed that decision and decided in favour of the defendant the present respondent

The facts of the case are fully stated in the report of the case before the appellate Court which will be found in I L R 38 Bom 77

On this appeal

Sir R Finlay K C and *Kenworthy Brown* for the appellant contended that time was not of the essence of the contract, nor did it become so by reason of the subsequent correspondence, and that if it was a term of the agreement that time should be of the essence of the contract, such term had been waived The law governing the case was to be found in section 55 of the Contract Act (IX of 1872) under which it was for the respondent to show that time was intended by the parties to be of the essence of this contract The intention cannot be proved by evidence extrinsic to the contract, but only by the terms of the written contract itself see section 91 of the Evidence Act (I of 1872) There was nothing to show such an intention in the contract in this case Merely fixing a time for completing the contract did not by itself show such an intention, nor did the clause fixing a time for payment of the balance of the purchase money with a provision that the deposit was to be forfeited on default in payment within the time so fixed show it was the intention of the parties that time should be of the essence of the contract [VISCOUNT HALDANE referred to *Stickney* v

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Keeble [1].] The contract in that case fixed a time for its completion, but it was held that time was not of the essence of the contract. The principle on which such a contract is interpreted is that its terms are sufficiently complied with if it is performed within a reasonable time after the date fixed. It was submitted therefore that time was not of the essence of the contract.

Leslie Scott, K. C. and *E. B. Raikes* for the respondent contended that by the agreement between the parties time was intended to be, and was, of the essence of the contract. The case of *Stickney* v. *Keeble* [1] was distinguishable: the contract in that case was in different terms from those of the agreement in the present case, and reference was made to page 416 of the report of that case per Lord Parker who said that the maxim that "in equity the time fixed for completion was not of the essence of the contract" only applied to cases where the stipulation as to time could be disregarded without injustice to the parties. Here it was submitted that if the time fixed was regarded as not of the essence of the contract it would be unjust to the respondent. [VISCOUNT HALDANE referred to *Lennon* v. *Napper* [2] which was cited in *Roberts* v. *Berry* [3] where it was decided that in contracts to sell land the stipulation as to time is differently interpreted by Courts of Law and Equity.] A Court of Equity holds that time is of the essence of the contract, (*a*) where the stipulation as to time is expressly so made, (*b*) where the property is such that the nature of the case makes time of the essence of the contract and (*c*) where from surrounding circumstances the Court can infer that it was the intention of the parties that it should be so. In cases previous to *Stickney* v. *Keeble* [4] it has been decided that time was

(1) [1915] A. C. 386.

(2) (1802) 2 Sch. & Lef. 682.

(3) (1853) 3 D. G. M. & G. 284.

(4) [1915] A. C. 386.

of the essence of the contract in circumstances similar to those in the present case see *Inglis* v *Buttery* [1] Where specific performance of a contract for sale of land is asked for by a purchaser in a Court of Equity the presumption is that time is not of the essence of the contract, and evidence it was submitted is admissible to rebut that presumption it is not considered to be evidence varying or inconsistent with the contract Reference was made to *Kreglinger* v *New Patagonia Meat and Cold Storage Company, Limited* [2] The Court can look at the surrounding circumstances for the purpose of deciding what was the intention of the parties see Taylor on Evidence (10th edn), Vol II section 1227 *Trimmer* v *Bayne* [3] *Seton* v *Slade* [4] and *Roberts* v *Berry* [5] Section 92 of the Evidence Act (I of 1872) in effect codifies the Common Law rule that evidence is not admissible to vary or contradict the terms of a written contract But in the present case it was the intention of the parties that time was to be of the essence of the contract, and section 92 was therefore not applicable reference was made to *Nokes* v *Kilmorey* [6], and *Tilley* v *Thomas* [7] The correspondence in the present case showed, it was submitted, that time was intended to be of the essence of the contract A clause similar to that in the contract in the present case was held to show that the intention of the parties was that time was of the essence of the contract, and that if the time was extended by consent the extension of time should be substituted for the period originally fixed without it being considered a waiver of the original condition as to

(1) (1878) 3 App Cas 552 at p 577
(2) [1914] A C 25
(3) (1802) 7 Ves 508
(4) (1802) 7 Ves 265
(5) (1853) 3 De G M & G 284
(6) (1847) 1 De G & Sm 444 at p 457
(7) (1867) L R 3 Ch 61 at pp 62 69 70

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time see *Gedye* v *The Duke of Montrose*[1], *Hudson* v *Temple*[2], and *Barclay* v *Messenger*[3] The clause should be similarly interpreted in the contract in the present case It is said that *Seton* v *Slade*[4] is adverse to this contention see White and Tudor's L C (6th ed), Vol II, 178, where the cases on the point are discussed But the present case is governed by section 54 of the Transfer of Property Act (IV of 1882) which gets rid of the whole of Lord Eldon's decision in *Seton* v *Slade*[4] In India there is no distinction between legal and equitable estates see *Webb* v *Macpherson*[5] Whether the contract is voidable depended upon section 55 of the Contract Act (IX of 1872), and it would be voidable if a time was fixed by the contract, and if the intention was that time should be of the essence of the contract [MR AMEER ALI —That section should be read with the Evidence Act, section 91 When a contract is reduced to writing, can you prove the intention of the parties from anything outside the contract?] If the contract stipulates that a thing should be done on a certain date, and if it is not done by that date the contract shall be at an end, as by Indian Law time would be of the essence of the contract see Specific Relief Act (I of 1877) section 12 and section 26, Illus (*b*) [LORD WRENBURY —Where a date is fixed by the contract the Court interprets it to mean ' or a reasonable time afterwards ' Can you cite a case to show that under those circumstances it has been held to mean that time is of the essence of the contract?] *Hudson* v *Bartram*[6] and section 108 of the Transfer of Property Act were referred to

(1) (1858) 26 Beav 45

(2) (1860) 29 Beav 536

(3) (1874) 43 L J Ch 449

(4) (1802) 7 Ves 265

(5) (1903) 31 Cal 57 at p 72 L R 30 I A 238 at p 245

(6) (1818) 3 Madd. 440

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The appellant was not called on to reply

1915, December 6th —The judgment of their Lordships was delivered by

VISCOUNT HALDANE —The question in this appeal is whether the appellant, who was the plaintiff in an action for specific performance, is entitled to the relief he has claimed Macleod J decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action

The facts may be stated briefly The Government of Bombay in 1898 granted to one Mothabai Bhikaji a reclamation lease of over 2 000 acres of land near Bombay for a term of 999 years The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910 He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to the satisfaction of the local Collector The lessee was further, not to assign or underlet, until the reclamation was complete without the consent in writing of the Collector In case of breach of any covenant or condition or provision of the lease the lessor had the right to re-enter and determine the lease The lease was transferred in 1908 to the respondent who had purchased it from the lessee

On the 8th July 1911 the respondent agreed in writing by a document in Gujarati, a translation of which was before their Lordships to sell the leasehold interest to the appellant for Rs 85,000, and the appellant paid Rs 4 000 of this sum as a deposit or earnest This agreement provided, by clauses 1 and 2, that the title was to be made marketable, that the conveyance was to be prepared and received within two months from

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the date of the agreement that on signing the document of sale Rs 80,500 were to be paid, and after its registration the remaining Rs 500 The 5th clause provided that on payment of the Rs 81,000 as provided by clause 2 the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period above mentioned he was to have no right to the deposit or earnest money of Rs 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell

There was a subsidiary agreement that the respondent should buy certain land belonging to the appellant for Rs 30,000, to be deducted from the Rs 81,000, but on this nothing turns

The appellant's solicitors proceeded to investigate the title, and they made requisitions Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father, one of certain mortgagees of the interest of Mothabai Bhikaji Another of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled This requisition was made on the 3rd October 1911, more than two months after the date of the contract The respondent did not comply with these requisitions but on the 6th October, through his solicitors asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed

If these requisitions were made in time their Lordships are of opinion that they were proper and that they were not adequately answered If time was not of the essence of the contract it is clear that they were

legitimately made, however the matter might stand as to one or other of them if time were of the essence This last question therefore lies at the root of the controversy and the answer to it is decisive of the appeal

The law applicable to the point is contained in section 55 of the Indian Contract Act 1872, which provides that—

When a party to a contract promises to do a certain thing at or before a specified time or certain things at or before specified times and fails to do any such thing at or before the specified time the contract or so much of it as has not been performed becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v *Napper*[1] which was adopted by Knight Bruce L J in *Roberts* v *Berry*[2] The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v *Thomas*[3] and by the House of Lords in the recent case of *Stickney* v *Keeble*[4] Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute

(1) (1802) 2 Sch & Lef 682

(2) (1853) 3 De G M & G 284 at p 289

(3) (1867) L R 3 Ch 61

(4) [1915] A C 386

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adopts and embodies in reference to sales of land It may be stated concisely in the language used by Lord Cairns in *Tilley* v *Thomas*[1] —

The construction is and must be in equity the same as in a Court of law A Court of equity will indeed relieve against and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract either for completion or for the steps toward completion if it can do justice between the parties and if (as Lord Justice Turner said in *Roberts* v *Berry*[2]) there is nothing in the express stipulations between the parties the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right This is what is meant and all that is meant when it is said that in equity time is not of the essence of the contract Of the three grounds mentioned by Lord Justice Turner express stipulations requires no comment The nature of the property is illustrated by the case of reversions mines, or trades The surrounding circumstances must depend on the facts of each particular case'

Their Lordships will add to the statement just quoted these observations The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties and it will enjoin specific performance notwithstanding that from the point of view of a Court of

(1) (1867) L R 3 Ch 61

(2) (1853) 3 De G M & G 284

Law the contract has not been literally performed by the plaintiff as regards the time limit specified This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of equity apply, when for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice In such cases, the circumstances themselves apart from any question of expressed intention, exclude the jurisdiction Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract *Tilley* v *Thomas*,[1] where specific performance was refused illustrates this class of transaction But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into

Applying these principles to the agreement before them their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies They are also unable to hold that the plaintiff

[1] (1867) L R 3 Ch. 61

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bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so As to the language of the agreement itself, without dwelling on a possible point in the plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of the conveyance, as distinguished from completion, they agree with Macleod J in the view that there is nothing said in it sufficient to exclude the equitable canon of interpretation And they agree in his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence They are unable to concur in the opinion of the learned Judges of the High Court in appeal that there was evidence that the plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the plaintiff to insist on his right to complete the purchase

These conclusions render it unnecessary to consider the other points dealt with in the High Court and elaborately argued at their Lordships' Bar The result is that they think that the appeal ought to be allowed and that the judgment of Macleod J restored and that the respondent should pay the costs of this appeal and in the Courts below They will humbly advise His Majesty accordingly

Solicitors for the appellant Messrs *Latteys & Hart*

Solicitors for the respondent : Messrs *T L Wilson & Co*

Appeal allowed

J V W

ORIGINAL CIVIL

Before Mr Justice Beaman

KARL ETTLINGER (PLAINTIFF) v CHAGANDAS & Co (DEFENDANTS)*

1915 *August 6*

*The Indian Contract Act (IX of 1872) section 56—Performance of contract becoming unlawful or impossible—Legal impossibility—Physical impossibility—Commercial impossibility—*Force Majeure*—Notifications under the Sea Customs Act (VIII of 1878)—Construction of contract—Charterparty—Bill of lading*

The plaintiffs a firm of naturalised Germans doing business in London made a contract on the 24th of July 1914 with the defendant firm through their London agent by which the defendants agreed to supply the plaintiff firm with 1 000 tons freight at 11s 6d per ton the material to be carried being manganese from the Port of Bombay for Antwerp shipment in September On the 4th of August 1914 war broke out between Great Britain and Germany On the 7th of August 1914 the Government of India by a Proclamation duly published in Bombay under the Sea Customs Act prohibited the export from India of ammunition and explosives and all materials used in the manufacture thereof Under the Sea Customs Act the Government of India is only empowered to prohibit the export of specified articles or things and the specification must be exact and *nominatim* Manganese not being expressly specified in the last mentioned notification the Government of India issued on the 17th of October 1914 a further notification in supercession of the notification of the 5th of August by which manganese was amongst other articles specifically prohibited On the 7th of September 1914 the defendants relying on the earlier notification telegraphed to the plaintiffs that owing to *force majeure* the contract was cancelled The plaintiffs refused to accept the cancellation and insisted upon the performance of the contract They subsequently sued the defendants in damages in the sum of £525 or Rs 7 937 The defendants pleaded (1) that the export of manganese from India was prohibited by the Government of India notification of the 5th of August 1914 published in Bombay on the 7th of August 1914 (2) that the performance of the contract became impossible as no freight was procurable during the month of September from Bombay to Antwerp (3) that it was an implied condition and of the essence of the contract understood by both parties to be so that there should be freight available from Bombay to Antwerp

Held (1) that having regard to the form of the earlier notification dated 5th of August 1914 the plaintiffs were right in contending that the defendants

* O C J Suit No 1407 of 1914

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might have performed their part of the contract on the 7th of August 1914 without contravening any law or being able to avoid it under section 56 of the Indian Contract Act as having been made unlawful after they had entered upon it

(2) The performance of the contract did not become impossible within the meaning of section 56 of the Indian Contract Act merely because freights from Bombay to Antwerp were not procurable from a commercial point of view when the defendants repudiated the contract

(3) That no implied condition could be read into the contract that it was agreed by the parties that normal freight conditions should continue

(4) That the defendants had committed a technical breach of contract, as the plaintiffs had not proved that they had any intention of shipping 1 000 tons of manganese to Antwerp in September nor had they suffered any loss on account of non shipment

Before a contract can be broken on the ground that the acts to be done have become impossible the Courts must be very sure that they are physically impossible Physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices

The latter part of section 56 deals with cases where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the making but before the performance of the contract, and extends to such cases the general principle of law applicable to all contracts and expressed in section 23

THIS was a suit to recover damages on a breach of contract The material facts are fully set out in the judgment of the learned Judge

Weldon with *Campbell*, for the plaintiffs

Desai with *Jinnah*, for the defendants

BEAMAN J —The plaintiffs Ettlinger & Co, a firm of naturalized Germans doing business in London made a contract on the 24th July 1914, with the defendant-firm through their London agent, Smith, by which the defendants agreed to supply the plaintiff firm with 1 000 tons freight at 11*s* 6*d* per ton, the material to be carried being manganese from the Port of Bombay for Antwerp shipment in September On the 7th of

September 1914, the defendants telegraphed to the plaintiffs that owing to *force majeure* the contract was cancelled The plaintiffs refused to accept the cancellation and hold the defendants to account for damages

It is contended on behalf of the defendants that they are absolved from performance of the contract on three grounds (1) that the export of manganese from India was prohibited by the Government of India Notification of the 5th of August 1914, published in Bombay on the 7th of August 1914 (2) that the performance of the contract became impossible as no freight was procurable during the month of September from Bombay to Antwerp , (3) that it was an implied condition, and of the essence of the contract understood by both parties *to be so that there should be freight available from* Bombay to Antwerp

With the assistance of the learned counsel on both sides I have been able to take a fairly comprehensive survey of this field of law brought up-to date in the recent work of Mr Trotter It is clear that the law of India is very different from what was the law of England on the point of impossibility of performance How far the law of England has, in recent times, been modified and brought more closely into accord with the Indian law, as expressed in section 56 of the Indian Contract Act, would be a matter of long, difficult and delicate critical analysis In this country whatever may have been the law of England, and whatever may now be the opinion of eminent Judges and Jurists in that country, it cannot be denied that after the contract has been made to do a certain act or acts and those acts become impossible, the contract is void Section 56 deals with two grounds upon which executory contracts become absolutely void the first of these is that which I have just stated, namely, that the act to be done

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should, after the contract has been made, become impossible The second is that the acts necessary to be done in order to carry out the contract should, after the contract has been made, and through no fault in the parties to that contract, become unlawful The latter part of the section deals with cases where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the making, but before the performance of the contract, and extends to such cases the general principle of law applicable to all contracts and expressed in section 23

The question, then, which I have to answer is really a question of comparative simplicity, whether any act which the defendant firm undertook to do under the contract of the 24th July became impossible before the month of September, or, at any rate, before the repudiation of the contract by the defendants on the 7th September and (2) whether any act which the defendants agreed to do under that contract became without any fault on the defendants' part, unlawful before the time of performance

In dealing with the question of impossibility, it has been difficult to keep out of sight the many refined distinctions and definitions drawn by some of our greatest English Judges in decisions through which the law of England is slowly built up and developed But what is interesting, and to be noted, is the great distinction originally existing between the English law and the Indian law laid down in the Contract Act is that in the former from the time of the case of *Paradine* v *Jane*[1] decided in the year 1617, until modifications and enlargements began to be introduced in the second part of the 19th century, no attention whatever appears to have been paid by the English Courts to the

[1] (1647) Al 26

impossibility or otherwise of the performance of obligations voluntarily undertaken The only distinction originally to be found is between obligations imposed on parties by law and obligations imposed upon them by their own voluntary acts In the former case the obligation was dissolved if the performance of the acts became impossible, but in the latter case not so Thus confined rigidly within very narrow limits and governed by a single strict principle the English law appears to me to have been intelligible and consistent, whatever may be thought of its reasonableness, up to such time when certain wide extensions and developments were given to it by the introduction of the numerous considerations which, notwithstanding the ingenuity of the Courts in seeking to apply them, do not appear to me to have succeeded in establishing any clear-cut and definite principle distinct from that which had theretofore been the law of the country Thus in the case of *Taylor* v *Caldwell*[1] we first come in sight of what, no doubt, underlies section 56 of the Indian Contract Act But the reasoning upon which that decision is based might, for all that I can see to the contrary, have been just as well and logically applied in all the earlier cases in which, as I have said, impossibility was never allowed as an excuse for non-performance of an absolute contract The very much later and more subtle extensions given to the gradually developing doctrine in the group of cases called the Coronation cases still appear to me to require very critical examination, and to leave the law in England open, in large measure to the application by Judges of what they may consider in the circumstances of each case to be its own justice The principle indeed upon which *Krell* v *Henry*[2] was decided may be thought to have been anticipated by Sir Charles

[1] (1863) 3 B & S 826 11 W R 726 [2] [1903] 2 K B 740

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Sargent in the case of *Goculdas Madhavji* v *Narsu Venkuji*[1], where the question was whether a contract ought to be enforced against a defendant who refused to perform it, because he had been unable to obtain a license authorising him to carry on operations profit from which had constituted the main, if not the only, motive of his contract Such a decision is clearly not referable to any ground of impossibility or unlawfulness, or to any principle up to that time recognized either in the English or the Indian Courts The case of *Taylor* v *Caldwell*[2] rests no doubt indirectly upon considerations of impossibility in this sense, that where the subject of a contract has been destroyed before the time of the fulfilment of the contract, the Courts held that the party injured could not recover

But in dealing with a case of this kind, I prefer to keep, as closely as I can, to the language of the Statute law in the first place and having exhausted its application, then and then only, if necessary, to turn to the consideration of other materials which might possibly be introduced, but in a different way, and for altogether different purposes, as a means of adjusting the rights of the parties in reference to particular contractual relations, rather than as an absolute ground of avoiding the whole contract

Looking, then, to the terms of the contract with which I have to deal, I have first to observe that it appears to incorporate by reference in the original contract a bill of lading, which is Exhibit H in this case on certain terms of which the plaintiffs rely That bill of lading appears to be in common form and excepts the usual perils of the sea, pirates, robbers restraint of princes and the like and expressly contemplates the existence of a state of war Now, on the happening of

(1) (1889) 13 Bom 630 (2) (1863) 3 B & S 826 11 W R 726

any of these contingencies after the goods had been accepted and the bill of lading signed, the master is thereupon authorised *to abandon the destined port of* disembarkation and deliver the goods at the nearest safe port And the contention of the plaintiffs has been that the conditions laid down in this bill of lading must be extended to and made to cover the original contract, so that should it have been found impossible to obtain freight from Bombay to Antwerp in the month of September, the defendants were still bound to obtain freight for the plaintiffs to the nearest safe port I cannot accede to that interpretation of the contract and the annexed bill of lading I think it could easily be pushed to absurdity The contract is a contract for a thousand tons of freight from Bombay for Antwerp and supposing when the time of fulfilment had arrived every port in Europe had been blockaded, could it be seriously contended that the defendants were still under an obligation to obtain freight from Bombay to Suez, which would, then, I suppose have been the nearest safe port? Would that have been of any advantage to the plaintiffs, and would they, on their part, have admitted that as a satisfactory discharge of the defendants' obligations incurred under the contract? The bill of lading has nothing to do with the events or conditions before the goods are received on board What the defendants bound themselves to do was to find freight from Bombay to Antwerp That being found the master would have signed the bills of lading certainly not primarily in the interest of the plaintiffs firm but to protect his own vessel from unnecessary risks He would then have been authorised to substitute for Antwerp should it have become, owing to war conditions or the restraints of princes or other like circumstances inaccessible and to discharge his goods at the nearest safe port, and this is obviously

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necessary, lest he might, once having loaded his vessel and embarked on a voyage, find himself under the obligation of retaining the goods on board at his own risk and peril until the conditions which render the port of destination inaccessible had been removed So that I do not think that the legal rights of the parties are in any way affected or modified by the addition of the bill of lading or its incorporation, if it has been incorporated, by reference in the original contract

I am, then, to see whether this contract, when it was made, became unlawful through any fault of the plaintiffs or the defendants The object of the contract, to use the language of section 23, was the shipment of 1,000 tons of manganese ore to Antwerp On the 7th of August 1914, three days after war had broken out between His Britannic Majesty and the German Austrian Empire, the Government of India Proclamation was duly published in Bombay, under the Sea Customs Act, prohibiting the export from India of various articles Amongst other things the export of ammunition and explosives, and all materials used in the manufacture thereof was prohibited Now it cannot be denied that manganese is a substance which might be used in the manufacture of ammunition It is true that no evidence has been led in this Court to prove that fact, and it is not a fact I suppose, of which a Court can take judicial notice But were that the only answer, I do not think that I should be disposed to give too much weight to the technicality The plaintiffs have a better answer Under the Sea Customs Act the Government is only empowered to prohibit the export of specified articles or things, and I take that to mean that the specification must be exact and *nominatim* It will not do to lump perhaps a thousand commodities *ejusdem generis* under a vague description This difficulty was doubtless felt by the Government

since a later Notification of the 17th of October was issued in supercession of the Notification of the 5th of August, and there we find the export of manganese specifically prohibited It is also in evidence here that whether it was or was not the intention of Government to prohibit the export of manganese that had not been actually done by the first Notification, for the official returns of the Chamber of Commerce show that considerable quantities of manganese were exported in August and September Had the Notification of the 5th of August specifically mentioned manganese and prohibited its export then I should have entertained no doubt but that the contract between the plaintiffs and the defendants had become unlawful It was contended on behalf of the plaintiffs that this would not necessarily follow inasmuch as all that the defendants contracted to do was to supply freight to the extent of a thousand tons for the plaintiffs and that it made no difference to the defendants to what use that tonnage was put But the terms of the contract are quite explicit The object was to export 1 000 tons of manganese, and if that was unlawful, then I should not hesitate to hold that this contract being inseparable from, and ancillary to that object it would be tainted with the same illegality But since the Notifications of August and October took the forms they did, I think that the plaintiffs are right in contending that at all times material to this contract the defendants might have performed their part of it without contravening any law, or being able to avoid it under section 56 of the Indian Contract Act as having been made unlawful after they had entered upon it

The third ground I may dismiss in a few words It does not appear to me that there is any recognized doctrine of law which goes the length the defendants would wish to press this contention No doubt it

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would ordinarily be the understanding of parties, particularly those engaged in buying and selling freight, that ships should be available But unless all the mercantile marine in the world had disappeared we must suppose that ships were available, and what is really meant by the defendants is that it was impliedly agreed upon by the parties that normal freight conditions should continue No Court has ever read such an implication as that, as far as I know, into any contract It could not, I think, even be said that any Court has yet held contracts made in times of peace necessarily implied the continuance of peace, unless the outbreak of war and its attendant conditions made the performance of the contract impossible or destroyed the subject-matter of it I have nothing of that kind to deal with here

This brings me to the main ground of defence, the second, whether the fulfilment of this contract became impossible in the month of September It appears to me that it hardly lies in the mouth of the defendants who definitely repudiated the contract as early as the 7th of September, to contend that they were justified in doing so because they had certain information that it had then become finally impossible for them to fulfil it It is to be remembered that the breaking of this contract was of the 7th of September when the defendants telegraphed to their agent in London that they had cancelled the contract Doubtless they had made inquiries for freight from Bombay to Antwerp, and had received uniform replies that no freights were procurable They say that they had even offered as high as 17s 6d per ton still there were no takers But before a contract can be broken on the ground that the acts to be done have become impossible, the Courts must be very sure that they are physically impossible What was called "legal impossibility" really belongs to the

other part of section 56, and, I think, I have said enough upon that head But physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices I suppose it can hardly be denied that ships might have been procured throughout the month of September to carry freight to Antwerp, if a sufficiently high price had been offered, or to put it at the highest, I suppose a ship could have been bought and despatched to Antwerp in the month of September It should be borne in mind that no restraints of princes prevented sea communication with Antwerp throughout the month of September Although war conditions prevailed on land and by sea, the commerce of the sea under the English flag had not then been, and never has since been interrupted No blockade of the port of Antwerp had then, or has ever since, unless now we can consider that it has been blockaded by the Allies, been established But doubtless after the town had fallen into the hands of the Germans it would have been insanity to despatch British ships and British cargo to it But who would have foreseen in the month of September that Antwerp was to be captured by the Germans on the 9th of October, and how can it be said that on the 7th of September it had become a physical impossibility to obtain freight, no matter what price was offered for it, from Bombay to Antwerp? What really happened was that freights rushed up, and that probably it would have been commercially impossible for the defendants to procure freight of a thousand tons of manganese from Bombay to Antwerp at any time during the month of September Even in London, according to the correspondence in this case, the best the plaintiffs could do was to obtain indications that freights might be had for anything between 21 and 23 shillings per ton for very much larger consignments than 1,000 tons, and it is a fact beyond dispute that no steamer sailed

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from Bombay to Antwerp during the month of September. So that upon all grounds of common sense and reason the defendants might well be exonerated from having played the plaintiffs false or in any way treated them unfairly. It only needs to read the correspondence to understand the true nature of this litigation. The plaintiffs receiving the defendants' telegram on the 7th of September immediately consult their solicitors and are told that from a legal point of view they are in a very strong position, and that having regard to the manner in which freights were going up everywhere they had *only to insist upon the performance* of the contract to obtain a very handsome sum from the defendants. I have not the least doubt that the plaintiffs had not the slightest intention or desire to ship this thousand tons of manganese to Antwerp *in* September, and I doubt very much, had the defendants been a little more discreet and held their hand whether the plaintiffs themselves would not have been the first to suggest the cancellation of the contract. Notwithstanding what has been suggested here on their behalf, it appears to me that the whole suit has been a very clever dodge in order to bleed the defendant upon an inflated claim for damages, whereas in fact the plaintiffs probably, I speak merely upon the case as far as it has gone, have not suffered any damage whatever, and never thought, after the war broke out, of sending their manganese to Antwerp. Technically, however, such evidence as has been led before me shows that they had 17,000 tons of manganese in *Bombay*, and therefore had the defendants offered them a thousand tons freight to Antwerp in September they were in a position to load the stuff. I need only call attention to the terms of their letter of the 18th of September to support what I have said as to the real meaning of this litigation. If freights had gone down, as they had

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suddenly gone up we should certainly have heard nothing whatever of this grievance It is not that the plaintiffs had really suffered any loss through manganese not being shipped to Antwerp but that because there has been a technical breach of contract on the defendants part they see their way, by claiming differences, to pocketing between £500 and £600 that this litigation has been pressed, still the law is the law, and I have little to do with the mere motives of those who are cunning enough and well advised enough to take advantage of it I cannot doubt but that there has been a technical breach of contract in this case and that the defendants are not justified by section 56 of the Indian Contract Act Neither do I doubt that the plaintiffs had not really sustained any damages

[His Lordship then proceeded with the trial further, and awarded to the plaintiffs one anna as damages No order was made as to costs]

Attorneys for the plaintiff Messrs *Crawford, Brown & Co*

Attorneys for the defendants Messrs *Payne & Co*

Suit decreed

G G N

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

1915 October 11

BHASKAR GOPAL AND ANOTHER (ORIGINAL DEFENDANTS) APPELLANTS v. LADMAN HIRA CHOWDHARI AND ANOTHER (HEIRS OF THE ORIGINAL PLAINTIFF) RESPONDENTS[*]

Transfer of Property Act (IV of 1882) section 54—Sale deed of property in possession of tenants—Deed should be registered

[*] Second Appeal No 177 of 1914

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BHASKAR GOPAL v. LADMAN HIRA

A house which was in the possession of defendants as tenants was sold to them by the owner in 1909 for Rs 50 by an unregistered deed of sale. It was again sold in 1910 by the owner to the plaintiff by a registered sale deed. The plaintiff having sued to recover possession —

Held, that the defendants were not entitled to set up their sale deed to defeat the plaintiff's claim for the deed though earlier in point of time required registration as the only interest which the vendor had at the date of the sale was a reversion in the house within the meaning of section 54 of the Transfer of Property Act (IV of 1882)

SECOND appeal from the decision of V G Kaduskar, First Class Subordinate Judge, A P, at Thana, modifying the decree passed by S J Yajnik, Subordinate Judge at Bassein

Suit for declaration and possession of a house

One Rama owned the house in dispute He had let it to defendants as tenants prior to 1909 Whilst the house was in possession of defendants, Rama sold the same to them for Rs 50 by an unregistered deed of sale in September 1909

On the 3rd June 1910, Rama's widow and daughters (Rama having died in the meanwhile) sold the house to the plaintiff by a registered deed of sale

The plaintiff filed the present suit on the 23rd September 1910, to obtain a declaration that he was the owner of the house, and to recover its possession and mesne profits

The Court of first instance was of opinion that the defendants sale-deed being unregistered was inoperative against plaintiff's claim, and granted the declaration sought but rejected the plaintiff's claim for possession and mesne profits on the ground that he had given no notice to quit

On appeal, the lower appellate Court came to the same conclusion as to the effect to be given to the defendants sale-deed, on the following grounds —

It is alleged in the written statement (exhibit 9) that the land had been in the possession of the defendant for fifteen years before the sale deed as a tenant and since the sale deed as owner thereof This continuous possession is urged as satisfying the requirements of section 54 of the Transfer of Property Act Under that section it is provided that when tangible immoveable property is conveyed for less than R 100 the transfer may be effected by an unregistered sale deed accompanied with delivery of possession This provision of law has received a stricter interpretation from the High Court of Calcutta which has held that the previous possession before the unregistered sale deed and continued after the deed cannot be equivalent to a delivery of possession under the deed so as to effect the transfer thereunder conveyed (*vide* I L R 34 Cal 207) This ruling has been referred to by Messrs Shepherd and Brown in their commentaries on the Indian Transfer of Property Act And on p 179 they have deduced the rule from the above ruling that where possession is already with the buyer there can be no transfer even of property under Rs 100 in value except by a registered instrument This result does no doubt sound not a little strange but would appear to have been based on the misleading character of the possession which under the circumstances cannot be unmistakably referred to the agreement of sale embodied in the unregistered deed and would fail in giving publicity to the transaction so as to warn persons subsequently intending to deal with the property and viewed at from this point of view the ruling referred to would appear to be in consonance with the spirit and policy of the Indian Transfer of Property Act This Act does not countenance sales of immovable property above the value of Rs 100 unless supported by a registered deed of sale which were recognised prior to the Act as good though not even reduced to writing The Act further provides even in respect of transfers of property below Rs 100 that the transfer cannot be good unless supported by an unregistered deed accompanied with delivery of possession So that as the section stands there cannot be a good transfer enforceable at law of tangible immovable property unless supported with a written instrument evidencing the agreement of sale If the value be Rs 100 and upwards a registered instrument would suffice to perfect the title Nothing short of it can effect the transfer If the value be below Rs 100 there ought to be a deed though unregistered accompanied with delivery of possession

In the former case the registration of the deed is enough notice to others subsequently dealing with the property and in the latter case the delivery of possession which is insisted on is intended to serve the purpose of a notice

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But in order to attract this significance the delivery must be in consequen of the agreement of sale unmistakably referrable to that agreement View at in this light the reasoning of the ruling referred to above can be ea understood and appreciated It is unnecessary for me further to dilate this point I need only say that I hold following the ruling referred above that there being no delivery of possession under the sale deed t defendant acquires no title to the property in dispute

The plaintiff's claim for possession and mesne profit was, however, allowed

The defendants appealed to the High Court

P B Shingne, for the appellants —The case of *Sibendrapada Banerjee v Secretary of State for India in Council*[1] does not apply As the consideration was below Rs 100, the sale-deed was not registered and as the property was already in the possession of appellants there could be no actual delivery of possession The vendor did all that was necessary to be done see Pollock and Mulla's Indian Contract Act, commentary on section 90

A G Desai, for the respondents, was not called upon

BATCHELOR, J —The suit in which this appeal arises was brought in ejectment, and the plaintiff made title on a registered sale-deed executed to him in *1910* by the widow and daughters of Rama, the original owner of the property The defendants resisted the suit on the ground that they were tenants of Rama prior to the year *1909* and that in the year *1909* the property was sold to them for Rs 50 by Rama's widow Admittedly this sale deed was not registered, but the defendants contention was that no registration was necessary, since the value of the property was under Rs 100 The lower appellate Court has decided in the plaintiff's favour, relying upon the case of *Sibendrapada Banerjee v Secretary of State for India in Council*[1], where

[1] (1907) 34 Cal 207

a certain parcel of land, having been transferred to the Public Works Department for a sum less than Rs 100 without any registered instrument the Secretary of State for India in Council sued the defendants to recover possession of the land, and, upon objection taken that the plaintiff acquired no title to the property inasmuch as the transfer upon which he relied contravened section 54 of the Transfer of Property Act, the Court held that since the transfer was not made by registered instrument and since the plaintiff had been in prior occupation, there could not be said to have been any delivery of possession within the meaning of section 54 of the Transfer of Property Act, and the plaintiff consequently acquired no title by the transfer No specific reasons are, however, given by the learned Judges for this decision which I have some difficulty in following It is not however, necessary for me further to consider the authority of this case because on another ground, I think that the defendants-appellants must fail

Section 54 of the Transfer of Property Act provides that, in the case of tangible immoveable property of a value less than Rs 100, transfer by way of sale may be made either by a registered instrument or by delivery of the property But the section draws a sharp distinction between tangible immoveable property and a reversion or other intangible thing The defendants contend that the thing sold to them was the tangible house, which indeed purported to be the object of the sale But it is clear that the vendor could not sell any higher interest than she possessed, and as at the date of the sale she had transferred possession to the defendants who were in possession as her tenants I am of opinion that the only interest which remained in the vendor was the reversion within the meaning of that term as used in section 54 That, so far as I am aware,

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is the only interest in the property which remains with a landlord after he has leased the immoveable property to tenants and has made over possession to them The word is used in this sense in Woodfall's Law of Landlord and Tenant and also in Lord Halsbury's Laws of England, Vol XVIII, paragraph 766 under the title "Landlord and Tenant" This use is in conformity with the definition contained in Stroud's Judicial Dictionary where a "reversion" is described as "the undisposed of interest in land which reverts to the grantor after the exhaustion of the particular estates,—*eg* for years, for life, or in tail,—which he may have created"

I think, therefore, that in this case as the sale was in law a sale of a reversion, it could, under section 54 of the Transfer of Property Act, be effected only by a registered instrument That being so, there was no legal sale to the defendants and the lower Court was right in decreeing the plaintiff's suit

This appeal, therefore, in my opinion, fails and is dismissed with costs

HAYWARD, J —The plaintiff sought to recover possession of certain land as the purchaser from the owner by a registered sale-deed The defendants alleged that they had been in possession as tenants from the owner and pleaded that they had subsequently on payment of a sum less than Rs 100 obtained delivery of further possession as owners in virtue of a prior unregistered sale deed The plaintiff succeeded in his suit in first appeal where it was held that the defendants had not received delivery of possession as owners following the case of *Sibendrapada Banerjee v Secretary of State for India in Council*[1] and that without such delivery of possession there could be no valid transfer of ownership by the prior unregistered sale-deed in

[1] (1907) 34 Cal 207

view of the provisions of section 54 of the Transfer of Property Act It has been argued on second appeal on behalf of the defendants that they did receive delivery of possession as owners and, therefore, obtained a valid transfer notwithstanding the invalidity of the attempted transfer by the unregistered sale deed contrary to the provisions of section 54 of the Transfer of Property Act

It seems to me important to consider closely what it was that was alleged to have been delivered into the possession of the defendants They alleged as already stated that they held actual possession of the term or tenancy and pleaded in effect that they had further received a symbolical possession of the interest remaining in their landlord that is to say that they had received possession of the reversion If authority be required for the proposition that that interest was a reversion, reference may be made to Woodfall's Landlord and Tenant *passim* and Halsbury's Laws of England Vol XVIII, in para 766 It is plain that actual possession can be given in the case of a term or tenancy to tenants, as that involves transfer of tangible immoveable property But, on the other hand symbolical possession alone can be given in the case of the right to possession at the end of the term or tenancy vested in the landlord, *i e* of the landlord's reversion as that involves transfer of intangible immoveable property No doubt a valid transfer can be effected for less than Rs 100 by delivery of actual possession without a registered instrument in the case of tangible immoveable property But the question here is whether a valid transfer could be effected for less than Rs 100 by delivery of symbolical possession without a registered instrument in the case of a reversion or intangible immoveable property It is not impossible to deliver symbolical possession Such delivery is familiar in

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law, and it is difficult to follow the arguments of the learned Judges in the case of *Sibendrapada Banerjee* v *Secretary of State for India in Council*[1] But is such delivery of symbolical possession recognized by law as a valid transfer? That depends on the interpretation of the terms of section 54 of the Transfer of Property Act

Now a sharp distinction has there been drawn between the mode of transfer of tangible immoveable property and the mode of transfer of a reversion or other intangible thing Where the property is valued at less than Rs 100, the transfer of the former, that is to say, tangible immoveable property can be effected either by delivery of possession or by means of a registered instrument But in the case of the latter, viz, intangible immoveable property, the transfer can be effected solely by registered instrument No doubt the reason was to avoid unnecessary obstacles in the transfer of unimportant immoveable property where delivery of actual possession would afford patent evidence of the transfer It was apparently not considered necessary in such cases to insist on the formalities of registered instruments Where, however, the delivery would be a disputable fact as where symbolical possession alone would be possible, then apparently it was considered necessary to insist on a registered instrument in the case even of unimportant immoveable property Here the transfer attempted was a transfer of a reversion or other intangible thing, and although that reversion was valued at under Rs 100, the transfer could be effected only by a registered instrument There was in this case no such registered instrument Therefore, the transfer was invalid by reason of the provisions of section 54 of the Transfer of Property Act

(1) (1907) 34 Cal 207

We ought, therefore, in my opinion, though for somewhat different reasons from those given by the learned Judge of first appeal, to confirm the decision of the lower appellate Court and to dismiss this second appeal with costs

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Appeal dismissed

R R

APPELLATE CIVIL

Before Mr Justice Shah and Mr Justice Hayward

1915 October 11

MURLIDHAR NARAYAN GUJARATHI (ORIGINAL DEFENDANT NO 1) APPELLANT v VISHNUDAS BALMUKUNDDAS (ORIGINAL DEFENDANT) RESPONDENT *

Transfer of Property Act (IV of 1882) sections 88 89—Civil Procedure Code (Act XIV of 1882) section 244—Limitation Act (XV of 1877) Schedule II Articles 178 179—Civil Procedure Code (Act V of 1908) section 97 Order XXXIV rules 1 and 5—Order passed under section 88 of the Transfer of Property Act if not appealed against cannot be questioned in an appeal from the decree absolute for sale

In 1907 a suit was filed to recover the mortgage amount by sale of the mortgaged property A preliminary decree was passed on the 30th of June 1910 as contemplated by Order XXXIV rule 4 of the Civil Procedure Code (Act V of 1908) ordering among other thing defendants Nos 1 and 2 to pay the mortgage amount within six months to the plaintiff and in default directing a sale of the mortgaged property The payment was not made and a final decree for sale was made on the 15th March 1912 Defendant No 1 appealed against the decree of 1912 and raised substantially points against the decree of 1910 The lower appellate Court held that the defendant not having appealed against the preliminary decree within time was precluded by section 97 of the Civil Procedure Code (Act V of 1908) from disputing its correctness in an appeal preferred from the final decree The defendant appealed to the High Court contending that the suit having been filed in 1907 the right of appeal which he had under the Civil Procedure Code of 1882 was not taken away by the Civil Procedure Code of 1908 —

Held that whether an order absolute for sale was treated as an order falling under section 244 of the Civil Procedure Code (Act XIV of 1882) and

* Second Appeal No 245 of 1914.

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appealable on that footing or not it was quite clear that even under the Civil Procedure Code of 1882 the correctness of the decree under section 88 of the Transfer of Property Act (IV of 1882) corresponding with Order XXXIV rule 4 of the Civil Procedure Code of 1908 could not be questioned in an application for an order absolute under section 89 or in an appeal from an order absolute made on such an application

SECOND appeal from the decision of G B Laghate, First Class Subordinate Judge, A P, at Nasik, confirming the decree passed by S A Gupte, Second Class Subordinate Judge at Yeola

Suit on mortgage

The guardian of Murlidhar (defendant No 1) passed *the mortgage in dispute to the plaintiff* on the 29th April 1897

On the 4th June 1907, the plaintiff filed the present suit to recover the money due on the mortgage

The Court of first instance passed a preliminary decree on the 30th June 1910, ordering defendants Nos 1 and 2 to pay the plaintiff Rs 3,367-8 0 and costs within six months, and directing the plaintiff, in default of payment, to recover the amount by sale of the mortgaged property The payment not having been made, the Court passed a final order, on the 15th March 1912 that the mortgaged property be sold to satisfy plaintiff's claim

The defendant No 1 did not appeal against the preliminary decree, but he appealed from the final order and in that appeal disputed the correctness of the preliminary decree also

The lower appellate Court held that the defendant No 1 not having appealed from the preliminary decree in time was barred, by section 97 of the Civil Procedure Code (Act V of 1908) from disputing its correctness in an appeal from the final order

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The defendant No 1 appealed to the High Court contending *inter alia* that the substantial right of appeal possessed by him under the Civil Procedure Code of 1882 at the date of the written statement could not be taken away by the Civil Procedure Code of 1908

Weldon, with *M V Bhat*, for the appellant —The appellant had a right of appeal under the Civil Procedure Code of 1882 the suit having been filed in 1907 That right cannot be taken away by the Civil Procedure Code of 1908 see *Ratanchand Shrichand v Hanmantrav Shivbakas*[1], *Colonial Sugar Refining Company v Irving*[2] *Nana v Shekh*[3]

Until a decree *nisi* under the Transfer of Property Act is made absolute there is no decree which is capable of execution see *Sir Jehangir Cowasji v The Hope Mills, Limited*[4] The substantial right of appeal cannot be taken away by section 97 as provided by section 154 of the Civil Procedure Code of 1908

The repeal of an enactment does not affect proceedings already commenced see section 6 of the General Clauses Act (X of 1897) The word "right" in section 7 of the Act includes a right of appeal To disturb an existing right of appeal is not a mere alteration of procedure see *Hurrosundari Dabi v Bhojoharri Das Manji*[5]

Coyaji with *S S Patkar* for the respondent —If the decree of 1910 be regarded as one governed by the Civil Procedure Code of 1882 it would be a decree under section 88 of the Transfer of Property Act The decree absolute for sale is an order passed under section 89 of the Act That order would be appealable in virtue of section 244 of the Civil Procedure Code of 1882

(1) (1869) 6 B H C R 166 (A C J)
(2) [1905] A C 369
(3) (1908) 32 Bom 337
(4) (1908) 33 Bom 273
(5) (1886) 13 Cal 86

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It has been held that an application for order absolute for sale in default of payment was an application for execution of decree passed under section 88 of the Transfer of Property Act see *Batuk Nath* v *Munni Dei* [1], *Abdul Majid* v *Jawahir Lal* [2], *Munna Lal Parruck* v *Sarat Chunder Mukerji* [3], *Amlook Chand Parrack* v *Sarat Chunder Mukerjee* [4] The correctness of the decree under section 88 cannot be questioned in an application for order absolute, under section 89 which is regarded as an application to execute the decree

SHAH, J —Several questions of law have been argued in this appeal, but it is necessary only to decide one of them as it is sufficient to dispose of the appeal

The facts connected with that point are briefly these The suit, out of which this second appeal has arisen was filed on the 4th of June 1907 on a mortgage dated the 29th of April 1897 The mortgagee sought to enforce his mortgage claim by sale of the mortgaged property A preliminary decree was passed on the 30th of June 1910 as contemplated by Order XXXIV, rule 4, of the Civil Procedure Code, ordering, among other things, defendants Nos 1 and 2 to pay the mortgage amount within six months to the plaintiff and in default directing a sale of the mortgaged property The defendants Nos 1 and 2 failed to pay the amount, and a final decree for sale was made on the 15th of March 1912 apparently as contemplated by rule 5 of the same Order The present appellant, who is defendant No 1, had not appealed against the decree of the 30th of June 1910, but he appealed to the District Court from the decree of the 15th of March within the time allowed by law In that appeal he substantially raised points against the decree of the 30th of June 1910 It was objected in the lower

(1) (1914) L. R 41 I A 104
(2) (1914) 36 All 350
(3) (1914) L. R 42 I A 88
(4) (1911) 38 Cal. 913

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appellate Court that in virtue of the provisions of section 97 of the Civil Procedure Code the appellant could not raise any point against the preliminary decree in his appeal against the final decree of the 15th of March 1912 The lower appellate Court held that the appellant was precluded from disputing the correctness of the preliminary decree in the appeal preferred from the final decree

The learned counsel for the appellant before us has questioned the correctness of this view and has urged that the present suit having been filed before the new Code came into force *the right of appeal must be held* to have accrued to him under the old Code of 1882, that it could not be taken away or modified in any way by the new Code, that under the old Code there was no distinction made between a preliminary and final decree and that it was open to him in appeal from the final decree to argue the whole case according to the repealed Code

In support of the first part of this argument he has relied upon the cases of *Ratanchand Shrichand* v *Hanmantrav Shivbakas*[1] *Colonial Sugar Refining Company* v *Irving*[2] and *Nana* v *Sheku*[3] and urged that the right to appeal accrued to him within the meaning of section 154 of the new Code of Civil Procedure not at the date of the preliminary decree but at the date of the suit This point is not free from difficulty though the decided cases apparently support the appellant's contention

But assuming, without deciding, in favour of the appellant that his right to appeal accrued to him at the date of the suit and that that right is governed by the provisions of the old Code it seems to me clear that

[1] (1869) 6 B H C R (A C J) 166 [2] [1905] A C 369
[3] (1908) 32 Bom 337

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even then his appeal to the District Court, so far as it related to the decree of the 30th of June 1910, would be barred Even if the decree be treated as one falling under the old Code, and the provisions of the Transfer of Property Act which were then in force, it is clear that the decree of the 30th of June 1910 for payment within six months would be a decree contemplated by section 88 of the Transfer of Property Act, and the order absolute for sale in default of payment would be made under section 89 of that Act Such an order is not referred to in section 89 as a decree, though the first adjudication is described as a decree in section 88 This order under section 89 would be appealable in virtue of the provisions of section 244 of the old Code read with the definition of the term 'decree' as given in that Code Whatever doubts there may have been on this point in virtue of the conflict of decisions as to whether an application for an order absolute for sale on default of payment by the mortgagor was one "for execution of decree" governed by Article 179 or "to enforce judgment' under Article 180 of the Limitation Act of 1877, or it was an application under section 89 of the Transfer of Property Act not subject to any period of limitation or governed by Article 178 of the Limitation Act of 1877, recent decisions of the Privy Council have placed the point beyond all doubt and controversy The cases of *Batul Nath* v *Munni Dei*[1], *Abdul Majid* v *Jawahir Lal*,[2] and of *Munna Lal Parruck* v *Sarat Chunder Mukerji*[3], in the last of which their Lordships of the Privy Council affirmed the decision of the Calcutta High Court in *Amlook Chand Parrack* v *Sarat Chunder Mukerjee*[4] show that an application for an order absolute would be really an application to execute the decree passed in accordance with section 88

[1] (1914) L R 41 I A 104
[2] (1914) 36 All 350
[3] (1914) L R 42 I A 88
[4] (1911) 38 Cal 913

of the Transfer of Property Act But whether an order absolute for sale is treated as an order falling under section 244 and appealable on that footing or not, it is *quite clear that even under the old Code the correctness* of the decree under section 88 of the Transfer of Property Act could not be questioned in an application for an order absolute under section 89 or in an appeal from an order absolute made on such an application The decree under section 88 of the Transfer of Property Act which is now called a preliminary decree under Order XXXIV rule 4, is the decree which must be appealed from, if the party concerned feels aggrieved by it and which, if not appealed from must be accepted as determining the rights of the parties for the purposes of all subsequent proceedings It is clear therefore that the defendant No 1 was precluded from disputing the correctness of the decree of the 30th of June 1910 in the lower appellate Court whether his right of appeal was governed by the new Code of 1908 or the old Code of 1882

On this ground alone the present appeal must fail The result is that the decree of the lower appellate Court is affirmed with costs

HAYWARD, J —I concur I have no doubt that the question sought to be raised here cannot be litigated in this appeal Even assuming that the old Code of 1882 has application the decree of 1910 ordering payment of the mortgage money and in default sale of the property would be a decree under section 88 of the Transfer of Property Act, and the order absolute for sale of the property in default of payment of the mortgage money would be an order under section 89 of the Transfer of Property Act If the appellant had desired to call in question the decree of 1910 he should have appealed against that decree and he cannot now in an appeal against the subsequent order bring into question

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matters decided in that decree There can be question, in my opinion, that the latter order would an order in execution and not a decree and would ha been governed by Article 179 of the old Limitation A of 1877 corresponding to Article 182 of the prese Limitation Act according to the decision of the Pri Council in the case of *Abdul Majid* v *Jawahir Lal*[1] This view has been confirmed by the subsequent dec sion of the Calcutta High Court holding that a simil case from the Original Side of that Court was governe by Article 183 of the Schedule of the present Limitatio Act This decision was in the case of *Amlook Chan Parrack* v *Sarat Chunder Mukerjee*[2] and was con firmed on appeal by the Privy Council in *Munna La Parruck* v *Sarat Chunder Mukerji*[3]

This proceeds on the assumption that the old Cod of 1882 had application The authorities quoted woul certainly appear to support that contention But i is not necessary to decide that question here in view o the foregoing remarks and of the fact that this appea would in any case be barred as an appeal under the new Code of 1908 being an appeal upon matters decided in a preliminary mortgage decree under rule 4 which could not be argued in appeal from the final decree for sale under rule 5 of Order XXXIV of the Schedule by reason of the provisions of section 97 of the present Code of Civil Procedure

This appeal must, therefore, be dismissed with costs

Decree affirmed

R R

(1) (1914) 36 All. 350 (2) (1911) 38 Cal. 913

(3) *(1914) L R 42 I A 88*

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

LAXMAN NILKANT PUSALKAR (ORIGINAL DEFENDANT) APPELLANT *v* VINAYAK KESHAV PUSALKAR (ORIGINAL PLAINTIFF) RESPONDENT* — 1915 *October 18*

Hindu Law—Decree against one co parcener—Right to attach and sell the interest of another co parcener in execution—Declaration suit for

The plaintiff sued for a declaration that the property of the defendant was liable to attachment and sale in execution of a decree obtained by the plaintiff in another suit (to which this defendant was not a party) against the defendant s undivided brother for money borrowed on the defendant s account The declaration having been granted the defendant appealed

Held that where the stage of sale had not been reached there was no reason for assuming jurisdiction to dispose of property belonging to one who was no party to the suit and was not a representative of the judgment debtor

SECOND appeal against the decision of M B Tyabji, District Judge, Ratnagiri, confirming the decree passed by K D Kulkarni, Subordinate Judge at Devrukh

Suit for declaration

This action was instituted by the plaintiff for a declaration that the defendant s interest in the plaint property was liable to attachment and sale in execution of the decree obtained in a Small Cause Court suit The plaintiff contended that the property in suit was the property of his judgment-debtor, the defendant had no interest in it and that the debt for the recovery of which his decree was obtained was binding on the defendant and one for which the property in dispute was liable

The defendant urged that his interest was not liable to attachment in execution of the decree

The Subordinate Judge declared that the property was liable for attachment and sale in execution of the

* Second Appeal No 446 of 1914

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LAXMAN NILKANT v VINAYAK KESHAV

plaintiff's decree, the defendant having no interest in the same

On appeal, the District Judge, confirmed the decree

The defendant preferred a second appeal

G K Parekh, for the appellant

B V Desai for the respondent

SCOTT, C J —This suit is brought by the plaintiff to establish his right to attach and sell the interest of the defendant (amounting to one-fourth of an equity of redemption) in execution of a Small Cause Court decree passed on an instrument of loan signed by the judgment debtor alone who was a brother and co-parcener of the present defendant The money is held to have been borrowed for the benefit of all the brothers The present defendant was not a party to the suit in the Small Cause Court

The question now to be decided is unembarrassed by the interest of any innocent Court-sale purchaser It is simply whether the unincumbered interest of a Hindu can be attached and sold in execution to satisfy a money decree obtained against his brother in a suit to which the objector was no party

It may be conceded that on the findings of the lower Court the present defendant was a principal disclosed or undisclosed of the borrower and the latter as an agent would have an agent's rights of indemnity, but that is not sufficient for the plaintiff He desires to obtain satisfaction direct from his debtor's brother's property A similar question was stated but not decided by the Judicial Committee in *Doorga Persad v Kesho Persad Singh*[1] In Bombay cases where the question has arisen the current of decision has not been uniform

[1] (1882) L R 9 I A 27 at p 31

1915

LAXMAN NILKANT v. VINAYAK KESHAV

Until *Hari Vithal* v *Jairam Vithal*[1] it was uniformly held in this Court that a sale under a decree against the manager of a Hindu family when that manager was not the father of the other co-sharers only passed the right, title and interest of the party to the suit see *Maruti Narayan* v *Lilachand*[2], *Pandurang Kamti* v *Venkatesh Pai*[3] *Lakshman Venkatesh* v *Kashinath*[4] In *Hari Vithal* v *Jairam*[1] however it was stated that 'Though in the Bombay Presidency the course of decisions as regards sales under a decree against a manager has been as stated in the case of *Lakshman Venkatesh* v *Kashinath*[4] still the right of a manager to bind the estate by transactions for its benefit is well established That being so the decision of the Judicial Committee in *Doulut Ram's case*[5] must now be held to govern cases, such as the present, where family property has been sold in execution of a decree against a manager alone It practically overrules the decision in *Lakshman Venkatesh* v *Kashinath*[4] and the preceding decisions there referred to' *Doulut Ram's case*[5] related solely to mortgaged property and it does not appear to me to affect in any way the authority of *Lakshman Venkatesh* v *Kashinath*[4] and kindred cases In a later case however, *Sakharam* v *Devji*[6], the view taken in *Hari Vithal* v *Jairam Vithal*[1] was adopted and re enforced by a reference to *Sheo Pershad Singh* v *Saheb Lal*[7] again a case of mortgage or as it is called in the report pledge '

Hari Vithal v *Jairam Vithal*[1] and *Sakharam* v *Devji*[6] have not been accepted without demur see *Madhusudan* v *Bhau*[8]

[1] (1890) 14 Bom 597
[2] (1882) 6 Bom 564
[3] (1879) 7 Bom 95 note
[4] (1886) 11 Bom. 700
[5] (1887) L R 14 I A 187
[6] (1898) 23 Bom 372
[7] (1892) 20 Cal 453
[8] S A. 443 of 1911 (Unrep)

1915

LAXMAN NILKANT v VINAYAK KESHAV

In *Kharajmal* v *Daim* [1] the Judicial Committee observed that the Court has no jurisdiction to sell the property of persons not parties to the proceedings or properly represented on the record although judicial sales are not disturbed on the ground that some members of the family who were minors were not parties if it appears that there was a debt justly due from a deceased member of the family and no prejudice is shown to the absent minors

This must now be taken subject to section 53 of the Civil Procedure Code In the present case the stage of sale has not been reached and there is no reason for assuming jurisdiction to dispose of property belonging to one who was no party to the suit and is not a representative of the judgment-debtor

I would reverse the decree and dismiss the suit with costs throughout

SHAH, J —I concur I desire to add that I express no opinion as to the correctness of the view taken in *Hari Vithal* v *Jairam Vithal* [2] that *Doulut Ram's case*[3] has the effect of overruling the earlier decisions of this Court in *Maruti Narayan* v *Lilachand* [4] and *Lakshman Venkatesh* v *Kashinath*[5] The point does not arise in this case, and when it arises it will require to be carefully considered in view of the doubt expressed in *Madhusudan* v *Bhau*[6]

Decree reversed

J G R

(1) (1904) 32 Cal 296 L R 32 I A 23
(2) (1890) 14 Bom 597
(3) (1887) L R 14 I A 187
(4) (1882) 6 Bom 564
(5) (1886) 11 Bom 700
(6) S. A 443 of 1911 (Unrep)

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Heaton

HANSA GODHAJI MARWADI (ORIGINAL DEFENDANT) APPELLANT *v* BHAWA JOGAJI MARWADI (ORIGINAL PLAINTIFF) RESPONDENT [*]

1915 November 10

Civil Procedure Code (Act V of 1908) Order XXI rule 2—Civil Procedure Code (Act XIV of 1882) sections 244 258—Decree—Execution—Satisfaction of the decree—Payment or adjustment not certified to the Court—Subsequent fraudulent execution

A decree was compromised by the parties out of Court The payment however was not certified to the Court The decree holder having fraudulently applied for the execution of the decree

Held that the Court should not in the exercise of its duty under section 244 of the Civil Procedure Code 1882 allow a clear case of fraud to be covered and condoned by the provision of section 258 of the Civil Procedure Code 1882 or Order XXI rule 2 Civil Procedure Code 1908

Trimbak Ramkrishna v Hari Laxman [1] followed

SECOND Appeal against the decision of Balak Ram Assistant Judge of Poona confirming the decree passed by D G Medhekar First Class Subordinate Judge of Poona

Execution proceedings

On the 13th March 1899 the plaintiff obtained a decree for Rs 2 508 against the defendant a minor On the 14th March 1899 a compromise was effected for Rs 2 000 in full satisfaction of the decretal debt The money was paid by the minor defendant's mother and a receipt was passed which was signed by the plaintiff and attested by two witnesses That payment was not however certified to the Court The plaintiff thereafter made several applications for the execution of the decree in which he stated that there had been no adjustment The last of these applications was made on

[*] Second Appeal No. 387 of 1914

[1] (1910) 34 Bom. 575

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the 11th February 1911 when the Court ordered e tion The defendant contended that the decree satisfied the day after it was passed, that the p iff instead of certifying the payment to the Co was agreed upon took no steps in the matter and represented that the payment had been certified

The Subordinate Judge held that the paymen been made as alleged by the defendant, but no had been practised and that under Order XXI, of the Civil Procedure Code, 1908, the decree con executed

The District Judge, on appeal confirmed the de

The defendant appealed to the High Court

Koyajee with *J R Gharpure* for the appellan We say that under Order XXI, rule 2 of the Civil cedure Code, 1908, the decree-holder applying execution of the decree is bound to make true statem to the Court It is also obligatory on him to repor adjustment if any to the Court see *Trimbal R krishna v Hari Laxman*[1] The Civil Court is precluded from inquiring into the question whethe adjustment has been made or not The trial Court found that the receipt of payment is proved lower appellate Court has not gone into the quest at all Upon the facts found it is a clear case of fr upon the Court see *Ramayyar v Ramayyar Gadadhar Panda v Shyam Churn Nasil*[3], *D Bundhu Nundy v Hari Mati Dassee*[4]

B G Rao for the respondent —Though the c may be one of fraud upon the Court, that is a matter a Criminal Court The Civil Court will not take not of that circumstance unless the provisions of tion 258 Civil Procedure Code 1882, or Order X

(1) (1910) 34 Bom 575 at p 581

(2) (1897) 21 Mad 356

(3) (1908) 12 Cal W N 4 5

(4) (1904) 31 Cal 480

rule 2 of Civil Procedure Code, 1908, are complied with see *Gokul Mandar* v *Pudmanund Singh* [1]

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HANSA GODHAJI v. BHAWA JOGAJI

SCOTT, C J — The material facts are that on the 13th of March 1899 the plaintiff, who is the present respondent, got a decree for Rs 2,508 with interest and costs against Hansa Godhaji, a minor Both the parties are Marwadis On the 14th of March the members of the caste assembled, and, as is held by the trial Court, effected a compromise for Rs 2,000 in full satisfaction of the decretal debt, and, as the first Court holds the money was paid by the appellant's mother and a receipt was passed which was signed by the plaintiff and attested by two witnesses That payment was not, however, certified to the Court On the 12th of March 1902 the plaintiff made an application for execution of his decree According to the Code he was obliged as provided by section 235 (*e*) to state in writing upon his verification whether any and what adjustment had been made by the parties subsequent to the decree He stated that there had been no adjustment That statement was false according to the finding of the trial Court The application for execution did not however, proceed, because the plaintiff neglected to pay the fees and so no notice was given to the judgment-debtor who had no knowledge of the application The judgment-debtor attained majority in 1904, and just before the expiry of three years from the date of the previous application in execution, viz, on the 10th of March 1905, the plaintiff made another application for execution in which he again made a false statement with reference to what was required to be stated as to adjustment in his application Again he omitted to pay the fees and in consequence no notice was given to the judgment-debtor On the 12th of February 1908 a further application was made containing a similar false statement,

[1] (1902) L. R 29 I A. 196 at p 202

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and that also was not proceeded with by reason of the plaintiff not paying the fees. On the 11th of February 1911 when the period of twelve years was about to expire within which it was necessary that the decree should be executed, if anything remained still to be paid, the present application was made, and again the same false statement was made by the plaintiff. This time, however, he had to pay the fees and the appellant received notice of the application. The execution has been ordered by both the trial Court and the District Court by reason of the provisions of the 3rd paragraph of Order XXI, rule 2, which corresponds to the old section 258. The trial Court came to a definite conclusion that in the application which it granted the judgment-creditor was trying to obtain, and was in fact obtaining, fraudulent execution of his decree which had already been satisfied. The Assistant Judge in the District Court came to the conclusion that, whether or not the payment had been actually made, it was not necessary to determine, although there was evidence on the record on the point, because by reason of Order XXI, rule 2, the Court could not recognize the payment or adjustment.

This question has already been considered in this Court in the case of *Trimbak Ramkrishna* v. *Hari Laxman*[1] in which the judgment of my learned colleague gives cogent reasons for holding that the Court should not in the exercise of its duty under section 244 allow a clear case of fraud to be covered and condoned by the provisions of section 258 or Order XXI, rule 2. It appears to us that the provisions of Order XXI, rule 11, clause (e), which have been brought to our notice by counsel for the appellant strongly confirm the conclusion indicated in the case referred to. A fraud, as is admitted in argument by the pleader for

[1] (1910) 34 Bom. 575

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the respondent, has, if the findings of the first Court are upheld in appeal, been clearly committed upon the Court in the application for execution by reason of the false statements made by the judgment-creditor, and we cannot permit a litigant by means of proved false statements to obtain an unjust order from the Court in execution

We, therefore, set aside the decree of the District Court and remand the case for trial on the question whether the payment was actually made or not as found by the trial Court and for disposal of the application with reference to the remarks in this judgment

Costs will be costs in the appeal

Decree reversed

J G R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Beaman

1915

November 30

SITABAI BHRATAR RAGHUNATH VYANKATESH VAIDYA (ORIGINAL PLAINTIFF) APPELLANT v. LAXMIBAI BHRATAR VYANKATESH VAIDYA AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS [*]

Civil Procedure Code (Act V of 1908) section 16 (d)—Maintenance suit for—Charge of maintenance—Right or interest in immoveable property—Jurisdiction

Plaintiff S filed a suit in Poona Court against her daughter in law L (defendant No 1) and her father (defendant No 2) both of whom resided in a native state beyond the jurisdiction of the Court for a declaration that she was entitled to a maintenance allowance and sought to make the same a charge on the immoveable property of L within the jurisdiction of the Court The lower Court held that it had no jurisdiction to try the suit as the claim for maintenance was not one for the determination of any right to or interest in the immoveable property as required by clause (*d*) of section 16 of the Civil Procedure Code The plaintiff having appealed

Held that the Court had jurisdiction to proceed against defendant No 1 as the question whether or not plaintiff was entitled to a right or interest

[*] Appeal from Order No. 49 of 1914

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v
LAXMIBAI

in the immoveable property by way of charge as security for maintenance which might be decreed was a question directly within the terms of section 16 (d) of the Civil Procedure Code 1908

Held also that the Court had no jurisdiction against defendant No [illegible]

APPEAL against the order passed by H A Betigeri First Class Subordinate Judge of Poona in suit No 69 of 1912

Suit for maintenance

Plaintiff Sitabai sued her daughter in-law, Laxmibai (defendant No 1) and her father (defendant No 2), for a declaration that she was entitled to maintenance of Rs 50 a month for her life and for residence, pilgrimage expenses and also for Stridhana property One of the prayers in the suit was that the liability to pay the sums claimed should be made a charge on the 1st defendant's land in the Inam village in the Bhimthadi Taluka of the Poona District Both the defendants lived in a Native State, Ichal Karanji, under the Kolhapur State

The preliminary question to be decided in the case was whether the suit was one which fell under section 20 of the Civil Procedure Code 1908, or was one coming under the scope of section 16 (d) of the same

The Subordinate Judge was of opinion that the suit did not fall under section 20 of the Civil Procedure Code, 1908, as the defendants admittedly lived outside the jurisdiction of the Court nor was it a suit falling under section 16 (d) of the Code His reasons for holding the latter were as follows —

A claim for maintenance is essentially a claim for food raiment and residence and not a claim essentially for property although the foundation of the claim is the possession of property by the person or persons against whom the claim is made Such property again may be solely immoveable or solely moveable or may partake of both kinds So a claim for maintenance may not necessarily and essentially be a claim against immoveable property To my mind a maintenance claim is essentially a money claim against the defendant grounded on the possession by him of property which was con

joint Primarily therefore it is not a claim as I am persuaded to believe for the determination of any right to or interest in immoveable property as required by clause *(d)* of section 16 of the Civil Procedure Code

He therefore, found that he had no jurisdiction to try the suit and returned the plaint for presentation to proper Court

The plaintiff appealed to the High Court

J R Gharpure for the appellant —It was an error to hold that the suit was not one falling within the jurisdiction of the Poona Court The suit was covered by section 16 of the Civil Procedure Code 1908 see *Sundara Bai Saheba* v *Tirumal Rao Sahib*[1] *Hemangini Dasi* v *Kedarnath Kundu Chowdhry*[2] *Narbada bai* v *Mahadeo Narayan*[3] *Savitribai* v *Luximibai*[4] *Mahableshvar Krishnappa* v *Ramchandra Mangesh*[5] Mayne's Hindu Law 8th edition, para 451 compare section 39 of the Transfer of Property Act 1882

P B Shingne for the respondent —The suit did not fall under section 16 of the Civil Procedure Code 1908 A suit for maintenance is not a suit for immoveable property A claim for maintenance is not a charge upon land unless expressly made so by a deed or decree see *Beer Chunder Manikkya* v *Raj Coomar Nobodeep Chunder Deb Burmono*[6], *Adhiranee Narain Coomary* v *Shona Malee Pat Mahadai*[7] *Sham Lal* v *Banna*[8] *Ram Kunwar* v *Ram Dai*[9] *The Bharatpur State* v *Gopal Dei*[10] At the time of the suit there was no *charge* on immoveable property It is immaterial if the order of Court *would* create a charge

At any rate defendant 2 was wrongly impleaded in the suit

(1) (1909) 33 Mad 131
(2) (1889) 16 Cal 758 at p 764
(3) (1880) 5 Bom 99
(4) (1878) 2 Bom 573
(5) (1913) 38 Bom 94 at p 100
(6) (1883) 9 Cal 535 at p 555
(7) (1876) 1 Cal 365
(8) (1882) 4 All 296
(9) (1900) 22 All 326
(10) (1901) 24 All 160

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SITABAI
v
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SCOTT, C J —The question is whether this suit can rightly be held to fall within the scope of section 16(d) of the Civil Procedure Code The learned Judge has held that it does not The suit is one by the mother of the deceased husband of the 1st defendant against that defendant and her father Both the defendants live in a Native State, and therefore in respect of personal claims they will not be liable to the jurisdiction of the Court unless the suit falls within section 16 The suit is for a declaration that the plaintiff is entitled to a maintenance allowance of a certain amount for her life against the 1st defendant and for residence and pilgrimage expenses and other claims, and also for stridhan property and one of the objects of the suit, which is set out in the prayer, is that the liability to pay the sums claimed should be made a charge on the 1st defendant's land in the Inam village in the Bhimthadi Taluka of the Poona District and on her share also in the said village The 1st defendant is sued as the person to whom the family estate has come upon death of her husband whose mother is the plaintiff Sitabai On the plaint as framed, the question which has to be decided before the Court will be enabled to pass a decree is whether or not the plaintiff is entitled to a right to or interest in immoveable property in the Bhimthadi Taluka by way of charge as security for the maintenance which may be decreed That being the question to be determined, it is a question directly within the terms of section 16 (d) of the Civil Procedure Code We therefore think that the learned Judge was in error We must set aside his order and direct that the suit do proceed against the 1st defendant, but we think that the Court had no jurisdiction against the second defendant Costs costs in the cause

Order set aside

J G R.

ORIGINAL CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Davar

DWARKADAS DAMODAR (APPELLANT) v DWARKADAS SHAMJI AND OTHERS (RESPONDENTS)*

1915 September 27

Settlement by a Hindu woman on trusts—The Indian Trusts Act (II of 1882) section 83—Trusts failing after settlor s death—Resulting trust in favour of settlor s heirs at the time of her death—The Indian Succession Act (X of 1865) section 191 effect of—The Probate and Administration Act (V of 1881) section 4 effect of

Where by a deed of settlement a Hindu woman conveyed an immoveable property to trustees on certain trusts some of which failed after her death (as being in favour of persons unborn at the date of the settlement)

Held (1) that there was a resulting trust in favour of the settlor

(2) that the persons entitled to the property on the failure of the trusts were the heirs of the settlor to be determined at the time of her death

Where a person dies intestate and no administration is granted to his estate the term legal representative in section 83 of the Trusts Act must include the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance The representative by inheritance is to be found according to law at the moment of the death of the deceased the maxim being *Solus deus haeredem facere potest non homo*

ORIGINATING Summons

One Hakoobai a Hindu woman conveyed by a deed of trust dated 11th December 1873, an immoveable property situated in Bombay to two trustees, Damodar Virji and Morarji Cooverji The deed of trust *inter alia* provided that the trustees were to hold the said property—

Upon trust to permit and suffer the said messuage hereditaments and premises hereinbefore described and intended to be hereby assured to be held occupied used and enjoyed and the rents issues and profits thereof to be received by or to pay the same unto the said Hakoobai during her natural life for her sole and separate use and from and after the decease of the said Hakoobai upon trust to permit the same premises to be used occupied and enjoyed and the rent issues and profits thereof to be received

* O C J Appeal No 16 of 1915

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DWARKADAS DAMODAR v. DWARKADAS SHAMJI

or to pay the same unto Gomtibai and Devkore (the only daughters of the said Hakoobai) for the term of their joint natural lives and for their sole and separate use respectively and from and after the decease of either of them the said Gomtibai and Devkore during the life time of the other of them and leaving issue her surviving upon trust as to one equal undivided moiety of and in the same hereditaments and premises for such issue absolutely if more than one in equal shares as tenants in common and not as joint tenants And in the event of the death of either of them the said Gomtibai and Devkore in the life time of the other of them and leaving no issue her surviving them upon trust with and out of the rents issues and profits of the hereditaments and premises hereinbefore described and intended to be hereby conveyed to lay out and expend a sum not exceeding Rs 1500 in the performance of the funeral ceremonies of such one of them the said Gomtibai and Devkore as shall die in the life time of the other of them leaving no issue her surviving and subject thereto upon trust to permit and suffer all and singular the said hereditaments and premises to be occupied used and enjoyed and the rents issues and profits thereof to be received or to pay the same unto the survivor of them the said Gomtibai and Devkore during her natural life for her sole and separate use And from and after the termination of the estate lastly hereinbefore limited to the survivor of them the said Gomtibai and Devkore upon trust to convey assign and assure all and singular the said hereditaments and premises hereinbefore described and intended to be hereby assured and the rents issues and profits thereof unto the issue of the body of the survivor of them the said Gomtibai and Devkore if more than one in equal shares as tenants in common and not as joint tenants and in default of any such issue upon trust for the heirs according to Hindu law of the survivor of them the said Gomtibai and the said Devkore

The said trust deed empowered the trustees to sell the trust property under certain circumstances and to invest the sale proceeds in Government Securities and to hold the same upon trusts

At the date of the trust deed Hakoobai had two daughters Devkore and Gomtibai and two grand daughters Matubai and Gatubai, daughters of Gomtibai

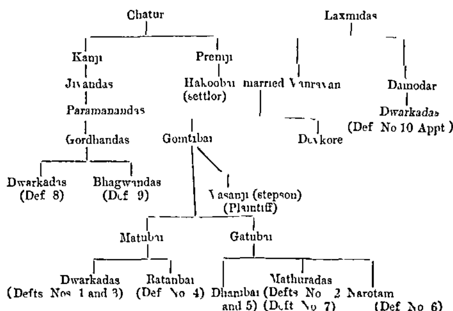
Damodar Virji who was one of the trustees died during the life time of Hakoobai

The plaintiff who was a step son of Gomtibai was appointed a trustee in Damodar's place on the ...th

October 1885 by Hakoobai in virtue of the power of appointment reserved under the trust deed The other trustee Morarji Cooverji died subsequently, and the plaintiff continued to be the sole trustee

Hakoobai died in 1890 Devkore had predeceased her in 1884 leaving no issue Matubai died in 1891, leaving her surviving Dwarkadas (defendant No 3) and Ratanbai (defendant No 4)

The following pedigree shows the relationship of the various parties —



In 1908 the plaintiff sold the trust property and invested the sale proceeds in Government Promissory Notes of the nominal value of Rs 55,000

On 8th March 1911 Gomtibai appointed her two grandsons Dwarkadas (defendants Nos 1 and 3) and Mathuradas (defendants Nos 2 and 5) co trustees with the plaintiff in virtue of the power of appointment reserved under the trust deed

In October 1915 Gatubai died leaving her surviving two sons, Mathuradas (defendant No 5) and Narotam

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(defendant No 6) and a daughter, Dhanibai (defendant No 7)

The trust property was used and enjoyed and the interest on the Government Promissory Notes was paid to Gomtibai till her death on 15th March 1914

Gomtibai left a will dated 30th September 1908 whereby she purported to bequeath the trust property to her daughter Gatubai and the children of her daughter Matubai

Dwarkadas (defendant No 8) and Bhagwandas (defendant No 9) were the descendants of an uncle of Harkoobai

Defendant No 10 was a brother's son of Harkoobai's husband, while defendant No 11 was a brother of the husband of Gomtibai

The plaintiff submitted that on a true construction of the trust deed Gomtibai took only a life estate in the trust property and that she had no right to make a testamentary disposition of it, the same being invalid and of no effect, that defendants Nos 3, 4, 5, 6 and 7, not having been born at the date of the said trust deed could not under Hindu Law take any benefit under it, and that the plaintiff who was born before the date of the trust deed was the nearest heir of Gomtibai capable of taking benefit under the trust deed and was absolutely entitled to the trust property

The plaintiff took out an originating summons on the presentation of the plaint and the defendants were called upon to attend before the learned Judge sitting in chambers for the determination of the following questions —

1 What estate did the said Gomtibai take under the said Indenture of trust?

2 Had the said Gomtibai any power to make a testamentary disposition of the said trust property ?

3 Is the will of the said Gomtibai in so far as it purports to dispose of the said trust property valid and operative ?

4 Can defendants Nos 3 4 5 6 and 7 not having been born at the date of the said Indenture take any benefit under the said Indenture as heirs of the body of the said Gomtibai ?

5 Can defendants Nos 3 4 5 6 and 7 not having been born at the date of the said Indenture take any benefit under the said Indenture as heirs of the said Gomtibai according to Hindu Law ?

6 Is the plaintiff according to Hindu Law a nearer heir of the said Gomtibai than defendants Nos 3 4 5 6 and 7 ?

7 Is the plaintiff according to Hindu Law a nearer heir of the said Gomtibai than defendant No 11 ?

8 In the events that have happened who is the person entitled to the said property ?

Macleod J decided that Gomtibai took a life interest under the trust deed that defendants Nos 3, 4, 5, 6 and 7 did not take any benefit under the trust deed as "heirs of the body" or as 'heirs' of Gomtibai that the plaintiff was not entitled to the property and that the trust came to an end on the death of Gomtibai without leaving heirs according to Hindu Law in existence at the date of settlement

Under question 8 the point arose whether the trust property went to the heirs of the settlor in existence when the trusts failed or the heirs of the settlor at the time of her death

The summons was adjourned into Court to decide whether Gomtibai or defendant No 10 was to be considered as the heir of Hakoobai

Macleod J decided that the trust property on failure of the trusts went to the heirs of the settlor at the date of the settlor's death The following Judgment was delivered by His Lordship

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MACLEOD J —This was an originating summons in which certain questions were propounded regarding a deed of settlement whereby one Harkoobai settled property upon the trusts therein mentioned

I held that in the events which had happened the trusts had failed and therefore the property reverted to the settlor or her heirs

As the settlor was dead when the trusts failed the question arose whether the 10th defendant who at the present time was the nearest in descent from the settlor was entitled to the property or the heirs or devisees of Gomtibai who was the heiress of the settlor at the time of her death

For the latter contention I think it was rightly argued that there can be only one heir or set of heirs to a deceased person namely, the person or persons who would be entitled at his death to succeed to his estate on intestacy No authority was cited for the proposition that the person nearest in relation at any particular time after the death is the heir though not the heir at the time of the death

Therefore I saw no reason why the 10th defendant should get his costs out of the estate as I am informed that the 10th defendant has filed an appeal on this question alone and I have been asked to write a judgment I have confined myself to this question

Defendant No 10 appealed

J Mehta and *Vibhakar* for the appellant

Jinnah and *Jayakar* for respondents 1 and 3

Vaidya and *Moos* for respondent 4

Desai for respondent 5

SCOTT, C J —This appeal comes before us on a judgment of Mr Justice Macleod upon an originating summons for the purpose of deciding certain questions with regard to a settlement executed by one Harkoobai on the 11th of December, 1873 The summons was taken out by one of the trustees of the settlement who also claimed to be a beneficiary entitled to the trust property in the events that had happened The other parties to the summons were the other trustees and all persons who could conceivably be supposed to be interested as the heirs of the settlor or her daughter Gomtibai

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The question concerning the plaintiff's beneficial interest was raised in the plaint in these terms —

> The plaintiff says that he was born at the date of the said indenture and is the nearest heir of the said Gomtibai according to Hindu Law capable of taking any benefit under the said indenture and submits that under the terms of the said indenture and a true construction thereof the plaintiff has become absolutely entitled to the aforesaid trust property

The plaintiff was represented in chambers upon the summons and had his case fully argued by Mr Setalvad, but after argument it was decided against him by the learned Judge and having regard to the fact that the matter has been fully considered and that no appeal has been preferred on behalf of the plaintiff, we must take it that the question of his interest is finally settled against him That question having been settled by the learned Judge there remained for decision Question 8 "In the events that have happened, who is the person entitled to the property It was conceded by all the parties to the summons except the unsuccessful plaintiff that in the events that had happened there was an intestacy and a resulting trust in favour of the settlor Then the question arose who were or was the heirs or heir of the settlor entitled to take the property On the one hand it was contended that the heir of the settlor at the time of her death was Gomtibai, her surviving daughter, and that since Gomtibai was dead at the date of the summons her children the respondents were entitled to the property On the other hand, the tenth defendant claimed that the heir of the settlor could not be ascertained until the extinction of the beneficial interests which were validly created under the settlement and that at the date of such extinction he was the nearest heir of the settlor

Now the law as to what are known in ordinary legal language as 'resulting trusts' is stated in section 83 of the Indian Trusts Act —' Where a trust is

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incapable of being executed, or where the trust is completely executed without exhausting the trust property, the trustee, in the absence of a direction to the contrary, must hold the trust property, or so much thereof as is unexhausted for the benefit of the author of the trust or his legal representative" Section 191 of the Indian Succession Act provides that "Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death" Similarly, the Probate and Administration Act, section 4, says —"The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such" That would include property falling into possession at the time of the testator's death or many years afterwards for all interests vest in the personal representative The executor or administrator as the case may be holds all property not validly disposed of for the persons beneficially entitled at the moment of the death of the deceased owner

In the present case we have to deal with the estate of a deceased intestate for which no administration has been granted We have only to find the beneficiary The Succession Certificate Act does not on the facts necessitate a grant of administration The term '*legal* representative' in section 83 of the Trusts Act must in such a case include the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance

The heirs then are the 'legal representatives' and they represent the estate of the deceased *for* the purpose of interests established by way of a *resulting* trust just as would the executor or *administrator* Their representation dates from the same *period* and the

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reversion under the resulting trust whether foreseen or unforeseen having vested as a transferable interest in the deceased vests on her death in her representative The representative by inheritance is to be found according to law at the moment of the death of the deceased, the maxim being "*solus deus haeredem facere potest, non homo*"

On behalf of the appellant it was argued that there could be no vested reversion till the succession opened" This expression is appropriate where there is a claim on the death of a Hindu widow enjoying her husband's estate but its use in the present case indicates the fallacy underlying the argument for the appellant To use the words of the Judicial Committee in *Moniram Kolita* v *Keri Kolitani*[1] the widow's "estate is an anomalous one, and has been compared to that of a tenant-in-tail It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband But whatever her estate is, it is clear that, until the termination of it it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband The succession does not open to the heirs of the husband until the termination of the widow's estate"

Here, the valid life interest of Gomtibai under the settlement was merely a "particular" estate by reason of which the reversionary interest of the settlor remained to fall into possession at some future time although capable of immediate transfer or inheritance

As Gomtibai was at the death of the settlor both the sole heir and the sole beneficiary capable of taking under the settlement, her life interest under the settlement merged in her reversion on the principle that

(1) (1880) 5 Cal 776 at p 789

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"whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater," 2 Blackstone's Commentaries, 177

This question of merger was not, however, argued and it is sufficient for the disposal of the appeal to say that Gomtibai and not the appellant was the settlor's heir If that had been the only question in appeal we should dismiss it with costs But it is not the only question There remains a question of costs

The question which we have dealt with in the foregoing remarks appears to have occasioned considerable difficulty in the lower Court It was argued on the 21st of November after the decision of the case against the plaintiff and was then adjourned for further argument into Court under the rule which permits a Judge to adjourn a case where he thinks fit for argument into Court

The tenth defendant had been brought before the Court by one of the trustees who for his own reasons wished to have all possible claims adverse to his claim disposed of in the originating summons, and it was also a matter of much interest and importance to the other trustees because they had to decide whether or not they held for their co-trustee or whether there was a resulting trust for the heirs of the settlor The case therefore, falls within the authorities which have been cited to us, *Rivers* v *Waidanis*[1] and *Buckton* v *Buckton*[2] both of which appear to us to justify the conclusion that the tenth defendant ought to be allowed his costs upon this summons and that being so, he is entitled to his costs of this appeal also

(1) (1907) 97 L. T 707   (2) [1907] 2 Ch 406 at p 414

We affirm the decree of the lowei Court except in this respect that the tenth defendant is entitled to his costs out of the estate We dismiss the appeal ordering all parties to the appeal to have their costs out of the estate

Solicitors foi the appellant —Messis *Chitnis, Motilal and Kanga*

Solicitors for the respondents —Messis *Madhavji, Kamdai and Chhotubhai*

G G N

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Hayward

1915 October 18

SONU VALAD KHUSHAL KHADAKE (ORIGINAL PLAINTIFF) APPELLANT v BAHINIBAI MURD KRISHNA AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS*

Civil Procedure Code (Act V of 1908) Order II Rule 2—Cause of action splitting up of—Bar does not apply where causes of action are different

On T s death his widow sold two of his Survey Numbers (403 and 404) to D and shortly afterwards sold Survey No 324 to Z who was a brother of D joint in estate After the widow s death B a daughter of T sued D and T (another daughter of T) to recover possession of Survey No 324 but the suit was at her request dismissed B then having sold the three Survey Numbers to the plaintiff the present suit was brought against the two daughters and D and Z to recover possession of the three Survey Numbers The lower Courts dismissed the suit on the preliminary ground that since B omitted to sue in respect of Survey Nos 403 and 404 in the first suit the plaintiff was debarred from preferring his claim to those numbers in the present suit The plaintiff having appealed

Held that the suit was not barred by the provisions of Order II Rule 2 of the Civil Procedure Code inasmuch as the two sets of facts which required to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts and the causes of action accordingly were different

* Second Appeal No 628 of 1914

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SONU VALAD KHUSHAL v. BAHINIBAI

SECOND appeal from the decision of C C Dutt, acting District Judge of Khandesh, confirming the decree passed by V P Raverkar, Subordinate Judge at Jalgaon

Suit to recover possession of land

Three Survey Nos (403, 404 and 324) which formed the subject matter of dispute belonged to one Tukaram After Tukaram's death, his widow Bhagirathi sold two of them (S Nos 403 and 404) to Dagadu (defendant No 3) in January 1906, and shortly afterwards sold Survey No 324 to Zagadu (defendant No 4) Dagadu and Zagadu were brothers who lived joint in estate with their brother Ukhardu (defendant No 5)

In April 1910, Bahinibai (defendant No 1), a daughter of Tukaram, filed a suit No 270 of 1910 against Zagadu and Tapi (defendant No 2), another daughter of Tukaram, to recover possession of Survey No 324 Both sisters Bahini and Tapi passed a deed of gift of the three Survey numbers to Tukaram (defendant No 6), son of Dagadu The suit was, on Bahini's request, dismissed on the 7th October 1910

On the 7th October 1910, Bahini sold the three Survey numbers to the plaintiff

The present suit was filed by the plaintiff to recover possession of the three Survey numbers

At the hearing a preliminary issue was raised "Whether this suit is barred under Order II, Rule 2 of the Civil Procedure Code particularly as Survey Nos 403 and 404 were not included in the previous suit?"

The first Court found the issue in the affirmative as the parties and the causes of action in both suits were the same

On appeal, the District Judge came to the same conclusion

The plaintiff appealed to the High Court

W B Pradhan, for the appellant —The cause of action in the first suit was the right of Bahini to succeed to the property of her father to the exclusion of her sister Tapi, whereas the cause of action in the present suit is the ouster of the plaintiff from the property which he is entitled to possess under the sale deeds The causes of action being thus different the case is not covered by Order II Rule 2 of the Civil Procedure Code The Rule does not say that every suit shall include every cause of action but that every suit shall include the whole claim arising out of the cause of action see *Rajah of Pittapur* v *Sri Rajah Venkata Mahipati Surya* (1), *Kashinath Ramchandra* v *Nathoo Keshav* (2)

P V Nysure, for respondent No 2

G S Rao, for respondents Nos 3 to 6 —The cause of action in the present suit is the same as the cause of action in the earlier suit viz, (1) Bahini's right to succeed to her father's property to the exclusion of Tapi, and (2) the wrongful possession of the defendants The parties to both suits are the same

The present suit is not competent, for the cause of action alleged here had arisen at the time the first suit was brought It is therefore barred under Order II, Rule 2 see *Nundo Kumar Nasker* v *Banomali Gayan* (3), *Umabai* v *Vithal* (4), *Sayed Gulam Nabi* v *Ajubibi* (5) and *Alisaheb* v *Mohidin* (6)

BATCHELOR J —This appeal is brought by the plaintiff His suit has been dismissed by both the Courts below

(1) (1885) L R 12 I A 116 at p 119
(2) (1914) 38 Bom. 444
(3) (1902) 29 Cal 871 at p 880
(4) (1908) 33 Bom 293 at p 304
(5) (1893) P J 417
(6) (1911) 13 Bom. L. R. 874

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on the ground that it was incompetent under Order II Rule 2 of the Civil Procedure Code

The suit was brought on a sale deed of October 1910 passed in the plaintiff's favour by the 1st defendant Bahini Bahini and Tapi were the daughters of one Tukaram Narayan who died in 1901, leaving his widow Bhagirthi and the two daughters I have named In the year 1910 Suit No 270 of that year was brought by Bahini, the present 1st defendant, against her sister Tapi, the present 2nd defendant, and Zagdu, the present 4th defendant, for possession of Survey No 324 which had been sold to Zagdu in January 1906 by Bhagirthi In the same month, January 1906, but a few days earlier, Bhagirthi had sold Survey Nos 403 and 404 to the present 3rd defendant, Dagdu It is found as a fact that Dagdu and Zagdu and the 3rd brother Ukhardu, defendant No 5, are joint in estate The present suit by Bahini s vendee was to recover possession of the three Survey Nos 324, 403 and 404

The question is, whether the lower Courts were right in holding that the suit was barred by Order II, Rule 2 of the Code That rule provides that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action," and that "where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted" In the view of the lower Courts the present claim in respect of Survey Nos 403 and 404 was, or was to be regarded as, a portion of the claim agitated in Bahini's suit of 1910 and was based upon the same cause of action It was consequently held that since Bahini omitted to sue in respect of Survey Nos 403 and 404 in 1910, the plaintiff was debarred from preferring his claim to those numbers in the present suit

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The question whether that decision is right seems to me to turn entirely upon whether the cause of action in the earlier suit was identical with, or different from, the cause of action in the present suit; and I differ from the learned Judges of the Courts below because, in my opinion, the two causes of action are distinct. As was said in *Kashinath Ramchandra* v. *Nathoo Keshav*[1] "the expression 'cause of action' refers . . . to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour" and "to every fact which it would be necessary for the plaintiff to prove . . . in order to support his right to the judgment of the Court." Where the question is whether the causes of action in two suits are different or identical, one of the most valuable tests appears to me to be that supplied by the authority of *Brunsden* v. *Humphrey*[2] where Lord Justice Bowen, in delivering judgment, quoted the following words used by De Grey C. J. in *Kitchen* v. *Campbell*[3]:—

> The principal consideration is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. And one great criterion of this identity is that the same evidence will maintain both actions.

And that test was applied by the Lord Justice for the decision of the particular case then before the Court. Adopting that same test here, it seems to me clear that the causes of action in the two suits were distinct. In the former suit the facts which the then plaintiff was under obligation to prove in order to entitle her to the Court's judgment, were that on the death of her mother the property devolved upon her and that the alienation to Zagdu of Survey No. 324 was invalid. But the facts, which Bahini or her vendee, the plaintiff, would have to prove in this suit in order to recover judgment, would be not only that Bahini took the property on the

[1] (1914) 38 Bom. 444 at p. 447.
[2] (1884) 14 Q. B. D. 141 at p. 147.
[3] (1771) 2 W. Bl. 827.

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death of her mother, but that the sale to Dagdu of the different Survey Nos 403 and 404 was invalid in law in other words, the two sets of facts which require to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts, and it follows in my opinion that the causes of action must be pronounced to be different Mr Rao in support of the judgment under appeal has called our attention to *Nundo Kumar Nasher* v *Banomali Gayan* (1) which was cited with approval in *Umabai* v *Vithal* (2) But these decisions do not, in my opinion, conflict with the view which I have expressed They go no further as I understand them, than deciding that it is open or competent or lawful for a plaintiff suing in ejectment to join as co-defendants various alienees who are in possession of portions or fragments of the property in suit They do not, I think, decide, what alone would assist the respondents here, that it is obligatory upon such a plaintiff to join all such alienees as co-defendants at the risk of forfeiting his right to recover from those whom he fails to join in his first suit In other words they do not decide that the cause of action supplied by one alienation is identical with the cause of action supplied by another

Upon these grounds I am of opinion that the lower Courts were wrong in dismissing the plaintiff's claim upon the preliminary ground that it was bad under Order II, Rule 2

The decree of the lower Court must be reversed and the suit must be remanded to be heard and decided on its merits in regard to Survey Nos 403 and 404 As to Survey No 324 the decision of the lower Courts has not been impugned before us and will stand

[Cos]ts of the appeal will be costs in the suit

(1) (1902) 29 Cal. 871 (2) (1908) 33 Bom. 003

HAYWARD J.—I concur. The causes of action were in my opinion not the same in the two suits. The cause of action in the suit of 1910 consisted of the title arising on the death of Bhagirthi and the alleged invalidity of the sale deed relating to Survey No. 324 in favour of Zagdu. The cause of action in the present suit of 1912 consisted of the title arising on the death of Bhagirthi and the alleged invalidity not, for present purposes, of the sale deed relating to Survey No. 324 in favour of Zagadu, but of another sale deed relating to other Survey Nos. 403 and 404 in favour of another man Dagdu. No doubt those two separate causes of action *might* have been joined together in one suit as raising the common question of title arising out of the death of Bhagirthi and affecting to some extent each of the two different defendants under the permissive provisions of Order I, Rule 3 of the Schedule of the Civil Procedure Code as in the cases of *Nundo Kumar Nasker v. Banomali Gayan*[1] and *Umabai v. Vithal*.[2]

But that is quite another thing from holding that those two separate causes of action *ought* to have been joined together in one suit against the two different defendants. The two causes of action were clearly separate because the invalidity of the sale deed in favour of Zagadu could not have been established solely by proof of the invalidity of the sale deed in favour of Dagadu. Nor would proof of the invalidity of the sale deed in favour of Zagdu alone have sufficed to settle the invalidity of the sale deed in favour of Dagdu. They could not be supported by the same evidence and that was the test adopted in the case of *Kashinath Ramchandra v. Nathu Kevlai*.[3] Moreover the two causes of action affected different defendants. There was therefore no legal necessity to join them in one suit as

[1] (1899) 2[illegible] Cal. [illegible]　　[2] ([illegible]) 33 Bom. [illegible]

[3] (1914) 3[illegible] Bom. 4[illegible]

B 436—

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neither claims under separate causes of action nor claims affecting different defendants are contemplated by the peremptory provisions of Order II, Rule 2 of the Schedule of the Civil Procedure Code It would not have mattered even if the two separate causes of action had *jointly* affected the different defendants and had not involved a *several* liability of each of the two different defendants For they would still have been beyond the contemplation of the peremptory provisions of Order II, Rule 2, though within the permissive provisions of Order II, Rule 3 of the Schedule to the Civil Procedure Code

I have ventured to add these remarks as it seems to me essential for the proper determination of these somewhat difficult questions of non-joinder and mis joinder that not only should the causes of action in each case be exactly comprehended but that a clear distinction should be maintained between the permissive nature of the provisions of Order I, Rule 3 and Order II, Rule 3 and the peremptory nature of the provisions of Order II, Rule 2 of the 1st Schedule to the Civil Procedure Code

Decree reversed suit remanded

R R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

1915
November 16

MAHOMED BEG AMIN BEG AND ANOTHER (HEIRS OF ORIGINAL PLAINTIFF No 2) APPELLANTS v NARAYAN MEGHAJI PATIL AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS *

Pre emption—Rule of pre emption does not exist in the Khandesh District—Bombay Regulation IV of 1827 clause 26

In the District of Khandesh in the Bombay Presidency the rule of pre emption does not exist either as a rule of law or as a rule of justice equity and good conscience

* Second Appeal No 198 of 1913

SECOND appeal from the decision of J Scotson, Assistant Judge of Khandesh, confirming the decree passed by M G Mehta, Subordinate Judge at Nandurbar

Suit to enforce the right of pre-emption

On the 3rd June 1909, plaintiff No 1 (a Mahomedan woman) sold two fields bearing survey Nos 189 and 197 to defendant No 1 who was a Hindu The plaintiffs who were Mahomedans and who owned fields adjoining those sold, brought the present suit to acquire the fields by the right of pre emption

It was contended by the defendant No 1 *inter alia* that the rule of pre-emption did not exist in the District of Khandesh

The Subordinate Judge found that the right of pre-emption did not exist in the District, on the following grounds —

The right of pre emption is a right to acquire by compulsory purchase in certain cases immoveable property in preference to all other persons It is not one of the matters in suit respecting which the Mahomedan law is expressly declared to be the rule of decision when the parties are Mahomedans (Wilson's Anglo Mahomedan Law section 350 Ed II) In *Nusrut Reza* v *Umbul Khyr* (8 W R 309) Phear J observes — The right to pre emption is founded on the supposed necessities of a Mahomedan family arising out of their minute sub division and inter division of ancestral property and as the result of its exercise is generally adverse to public interest it certainly will not be recognised by this Court beyond the limits to which those necessities have been judicially declared to extend In *Deokinandan* v *Sri Ram* (I L R 12 All 234) Mahmood J at p 266 remarks as follows — Among those facts is a proposition [illegible] cannot be controverted and which apparently was not pressed upon the [illegible] tion of the learned Judges forming the majority of the Full Bench [illegible] Mr Justice Roberts dissented that as a matter of fact [illegible] theoretical surmises or hypothesis the right of *Shufa* or pr[illegible] known in those parts of India where Mahomedan juris pru[illegible] days gone by had full sway and where Mahomedan influe[illegible] vigorously as in this part of the country and other part[illegible] Bengal and in some parts of the Bombay Presidency, [illegible]

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applied

On appeal, this decree was confirmed by the Assistant Judge

The plaintiff No 2 appealed to the High Court

D C Virkar for the appellant —The right of pre-emption is an independent right It is entirely unaffected by the Transfer of Property Act 1882 It has been recognised by Courts *Baijnath Ram Gaenka* v *Ramdhari Chowdhry*[1], *Jadu Lal Sahu* v *Janki Koer*[2] and *Digambar Singh* v *Ahmad Sayed Khan*[3] It arises only on the completion of sale *Budhai Sardar* v *Sonaullah Mridha*[4] and *Najm-un-nissa* v *Ajaib Ali Khan*[5]

The case is governed by section 27 of Bombay Regulation IV of 1827 There is no statute law on the subject of pre-emption in Bombay in the absence of usage, therefore, the law of the defendant must apply The expression "the law of the defendant" has been interpreted in various cases see *Amin Un Nissa Begum* v *Clement Dale*[6] *Sarkies* v *Prosonomoyee Dossee*[7] and *Gobind Dayal* v *Inayatullah*[8]

The rule of pre-emption is binding on Mahomedans In the Bombay Presidency, it is binding, in the Districts of Surat and Broach, as a usage on the Hindus *Gordhandas Girdharbhai* v *Prankor*[9] *Reva* v *Dulabhdas*[10], *Ranchoddas* v *Jugaldas*[11]

P B Shingne for the respondent —"The law of the defendant" in clause 26 of Bombay Regulation IV of 1827 refers to the law of the vendee If the vendee is a Hindu, the right of pre-emption cannot be enforced

(1) (1907) L R 35 I A 60
(2) (1912) L R 39 I A 101
(3) (1914) 37 All 129
(4) (1914) 41 Cal 943
(5) (1900) 22 All 343
(6) (1868) 6 Mad H C R 455
(7) (1881) 6 Cal 794
(8) (1885) 7 All 775 at p 784
(9) (1869) 6 Bom H C R 263 (A C J)
(10) (1902) 4 Bom L R 811
(11) (1899) 24 Bom 414

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against him *Sheikh Kudratulla* v *Mahini Mohan Shaha*[1] The right cannot be enforced on the grounds of "justice, equity and good conscience," which expression has been interpreted to mean the common law of England *Dada Honaji* v *Babaji Jagushet*[2] and *Waghela Rajsangi* v *Shekh Masludin*[3] The right is not recognised by the law of England Even by the Mahomedan Law, it has been regarded with much disfavour The High Court of Madras has declined to recognise the right *Ibrahim Saib* v *Muni Mir Udin Saib*[4]

Vakil, in reply, referred to Wilson's Anglo Mahomedan Law, p 381, Ameer Ali's Mahomedan Law, Vol I, p 722, the Punjab Laws Act, 1872, and the Oudh Laws Act, 1876

BATCHELOR, J —The plaintiffs, who are the appellants before us, are two Mahomedan women, and they brought this suit to enforce their right of pre-emption in respect of two agricultural survey numbers which were sold by the 2nd defendant, a Mahomedan woman to the 1st defendant, a Hindu The plaintiffs own the fields adjoining the land sold

The suit is from a village in the Nandurbar Taluka of the Khandesh District Both Courts have held that the Mahomedan right of pre-emption does not exist in the Khandesh District and have accordingly dismissed the suit

It is to be observed that no attempt was made in the trial Court to prove the right of pre-emption as a special custom or usage, but the plaintiffs relied exclusively on the doctrine of Mahomedan Law It is now contended on behalf of the plaintiffs in this appeal that the

(1) (1869) 4 Beng L R 134 (F B) (2) (1865) 2 Bom H C R 36 (3) (1887) 11 Bom. 551 (4) (1870) 6 Mad. H C R 26

Mahomedan rule of pre-emption exists in the District of Khandesh and should be enforced here, notwithstanding that the purchaser was a Hindu This contention is based on clause 26 of Regulation IV of 1827, and the reference there occurring to "the law of the defendant' Seeing that the principal defendant here, the purchaser of the property, is a Hindu, the appeal, it seems to me, would be exposed to many difficulties, even if the Court conceded the appellants' primary argument that the Mahomedan rule of pre emption was operative in Khandesh But in my opinion that argument cannot be conceded

Clause 26 of the Regulation of 1827 is as follows —

The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case in the absence of such Acts and Regulations the usage of the country in which the suit arose if none such appears the law of the defendant and in the absence of special law and usage justice equity and good conscience alone

It is admitted in argument that the phrase 'Regulations of Government must to day include the Acts of the Indian Legislature governing the sale of immoveable property, that is to say, the Indian Contract Act and the Transfer of Property Act That being so, there does not here exist that absence of Regulations which alone permits the Court to have recourse to 'the law of the defendant,' and the appeal must be decided by reference to the Acts, not by reference to the defendant's personal law It is urged that the Transfer of Property Act and the Indian Contract Act are merely silent upon the question whether the rule of pre-emption survives But the answer, in my opinion, is that that rule cannot be recognized unless the provisions and principles of these Acts are disregarded For, the rule is a clog or fetter upon that freedom of sale for which the Acts provide This becomes, I think, the more clear if a comparison is made between Chapter III of the Transfer

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of Property Act, which deals with sales, and Chapter II which deals with the general principles of the transfer of property and contains provisions regarding vested and contingent interests, or Chapter VII which deals with gifts By section 2 (*d*) of the Act it is enacted that "nothing in the second Chapter shall be deemed to affect any rule of Mahomedan Law," and section 129 of the Act contains a similar provision saving the rules of Mahomedan law in regard to gifts But the sections as to sales are quite general and contain no such restriction Therefore, I do not think that the appellants can succeed by virtue of this doctrine as a naked rule of law The pertinent rules of law, as I think, are those to be found in the Statute This view is in accordance with the judgment of the Acting Chief Justice Holloway in *Ibrahim Saib* v *Muni Mir Udin Saib*[1] and, in my opinion, that decision is applicable generally to this Presidency with the exception of Gujarat It is true that the Mahomedan rule of pre-emption, at least as between Musalman litigants is accepted by the High Courts of Allahabad and Calcutta But this circumstance, so far from assisting the present appellants, really supplies, as I think, another sufficient reason for dismissing the appeal For, in the United Provinces and Bengal, owing to local conditions which are not reproduced in this Presidency, there has been a course of judicial decisions in favour of the recognition of pre emption, whereas in the district of Khandesh there is admittedly not a discoverable instance in which this right has been either allowed by the Court or even asserted by any litigant And this fact which I think, is true of the Presidency generally except Gujarat affords conclusive evidence that to enforce the rule of pre-emption now would be to introduce into the law of property an innovation

(1) (1870) 6 Mad H C R 26

which is as foreign to the practice of the people as it is to the Statutory law. I desire to say nothing as to what the result would be if there were evidence in this case establishing a local custom in favour of the rule of pre-emption. For, a custom is a local common law as it existed before the time of legal memory, as was said by Jessel M. R. in *Hammerton* v. *Honey*[1]. And I see nothing in Clause 26 of the Regulation which would prohibit the Court from giving effect to the established local custom in modification of the provisions of the Act, though whether the Court would do so or not is a matter which it is not now necessary to determine.

From what I have already said it follows that, in my opinion, the appellants could not succeed under the Regulation even if they were able to show that the rule of pre-emption should be accepted by us as a rule of justice, equity and good conscience. Out of respect, however, to the arguments which have been heard upon the point, I will state that my own opinion is that this Court cannot recognize such a rule as a rule of justice, equity and good conscience. The decisions in *Dada Honaji* v. *Babaji Jagushet*[2] and *Waghela Rajsanji* v. *Shekh Masludin*[3] are authorities for the view that it is to the English law in general that we must look for guidance as to what is a principle of justice, equity and good conscience. And this particular rule is, I have said, is not in accordance with the principles of English law. On this point I desire to express my concurrence with what was said by Mr. Justice Phear in *Nusrut Reza* v. *Umbul Khyr Bibee*[4]: "The right to pre-emption is very special in its character. It is founded on the supposed necessities of a Mahomedan family, arising out of their minute sub-division and inter-division of ancestral property

[1] (1876) 24 W. R. (Eng.) 603.

[2] (1865) 2 Bom. H. C. R. 36.

[3] (1887) 11 Bom. 551 at p. 561.

[4] (1867) 8 W. R. 309.

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and as the result of its exercise is generally adverse to public interest, it certainly will not be recognised by this Court beyond the limits to which those necessities have been judicially decided to extend" It seems almost unnecessary to add that the rational basis and justification for the rule of pre-emption has largely, if not entirely, disappeared in the mofussil on this side of India As to the position in Gujarat upon which much was said in argument that is now not so clear as it was, since the earlier decisions have been questioned by Mr Justice Beaman and Mr Justice Macleod in *Dahyabhai Motiram* v *Chunilal Keshordas*[1] Whether the earlier decisions should still be followed is a question upon which, since the point does not now arise, it would be improper for me to express an opinion I may, however, say just this, as the result of considerable experience as District Judge of Ahmedabad, that the judicial recognition of pre emption in Gujarat, particularly amongst Hindus in that province has always appeared to me anomalous and artificial

On these grounds I am of opinion that the appeal fails and should be dismissed with costs

SHAH, J —I am of the same opinion I desire to state briefly the grounds upon which I have arrived at the same conclusion

The lower Courts have rejected the plaintiffs claim for pre-emption, and the dispute now is substantially between the pre-emptors and the purchaser of the agricultural lands in suit

Under section 26 of Regulation IV of 1827, the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case, in the absence of such Acts and Regulations,

(1) (1915) 39 Bom. 183

the usage of the country in which the suit arose, if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

On behalf of the purchaser it is urged that the Transfer of Property Act and the Indian Contract Act are applicable to this case that there is no saving clause in favour of the Muhammadan Law of pre-emption that the provisions of the Acts are inconsistent with the right of pre-emption, and that the rules as to pre-emption must be deemed to have been abrogated by these Acts. There is considerable force in this argument. But Mr. Shingne has not been able to suggest any satisfactory answer to the two difficulties, which present themselves in the way of accepting it. Firstly in spite of these Acts, the right of pre-emption according to Muhammadan Law has been enforced in virtue of the usage of the country in certain parts of India outside this Presidency and in Gujarat, or at least in certain parts of Gujarat, in this Presidency. Secondly Chapter III of the Transfer of Property Act, which relates to sales of immoveable property does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales, and contains provisions as to the rights and obligations of the seller and the buyer in the absence of a contract to the contrary. I, therefore hesitate to accept Mr. Shingne's contention.

Assuming, however without deciding, that there is no statutory provision applicable to the case, it is clear that the plaintiffs cannot rely upon the 'usage of the country,' as both the lower Courts have held that there is no custom of pre-emption recognised in the District of Khandesh and that there has been no instance of the right of pre-emption having been exercised in that District.

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The law of the defendant cannot justify, in my opinion, the application of a special rule of Muhammadan Law to a case of this kind, in which there are two defendants one a Muhammadan and the other a Hindu the latter being substantially interested in his own right There has been some difference of opinion in other parts of India as to whether a non Muhammadan purchaser buys the property subject to the right of pre-emption according to the Muhammadan Law It may be, that there is good reason for the view that the non-Muhammadan purchaser buys the property subject to the right of pre emption in those parts of the country, where such a right is enforced on the ground of usage or as a rule of the Muhammadan Law But that reason, as I understand it, is not that it is, 'the law of the defendant,' but that it is in accordance with justice, equity and good conscience to enforce the right of pre-emption against the non Muhammadan purchaser in such a case

Lastly, it is argued by Mr Virkar that the right of pre-emption should be enforced as a rule of justice equity and good conscience I am quite unable to accept this argument I agree generally with the observations relating to this point in *Ibrahim Saib* v *Muni Mir Udin Saib*[1] and hold that the right of pre-emption according to Muhammadan Law cannot be enforced solely as a matter of justice, equity and good conscience

Mr Virkar has relied upon the case of *Gobind Dayal* v *Inayatullah*[2] The conclusions of Mahmood J in that case cannot apply to the present case as the words of section 24 of the Bengal Civil Courts Act, upon which they are based are materially different from the words of section 26 of Bombay Regulation IV of 1827 The other Judges in that case apparently based their

[1] (1870) 6 Mad H C R 26 [2] (1885) 7 All 775 at p [illegible]

conclusion upon the ground stated in the judgment of Oldfield J, that on grounds of equity the Muhammadan Law in claims of pre emption had always been held to bind Muhammadans and had always been administered between them The Muhammadans were found as between themselves to hold property subject to the rules of Muhammadan Law, and it was not considered equitable that persons, who were not Muhammadans but who had dealt with Muhammadans in respect of property, knowing perfectly well the conditions and obligations, under which the property was held, should, merely by reason that they were not themselves subject to Muhammadan Law be permitted to evade those conditions and obligations This reasoning cannot apply to cases arising in a District where the right of pre-emption is not shown to have been exercised even as between Muhammadans, and where the persons not themselves subject to Muhammadan Law cannot be properly held to know that a Muhammadan holds the property in that District subject to the obligation of offering it to his neighbours before selling it to a stranger

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Appeal dismissed

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APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Shah

GANGABAI PEERAPPA MINOR BY HER GUARDIAN *ad litem* HOWANNA BIN NILLAPPA (ORIGINAL DEFENDANT) APPELLANT v BANDU BIN PEERAPPA (ORIGINAL PLAINTIFF) RESPONDENT*

1915

December 10

Hindu Law—Sudras—Inheritance—Illegitimate son—Extent of share

Among Sudras an illegitimate son of a concubine stands on the same level as to inheritance as the *dasi putra* and the extent of his share in competition with a legitimate daughter would be one half of the share taken by the daughter that is one third of the whole estate

* Second Appeal No 668 of 1914

1915

GANGABAI PEERAPPA v. BANDU

SECOND appeal against the decision of Dr F Desouza, District Judge of Sholapur, confirming the decree passed by G L Dhekne, Subordinate Judge Sholapur

The property in suit belonged to one Pirappa who was by caste a Lingayat Pirappa died in 1907 leaving him surviving a Lagna wife by name Limbabai who had no issue, a Mohatar wife who had two daughters one of them being Gangabai (defendant) He had also an illegitimate son Bandu (plaintiff) by a concubine Sitabai, who was by caste a Shimpi woman At the date of the suit all these persons except the plaintiff and the defendant were dead The plaintiff sued as the *dasi putra* of Pirappa to recover possession of the property belonging to him

The defendant contended that the plaintiff had no interest in the property as he could not claim the position and rights of a *dasi putra* according to Hindu Law

The Subordinate Judge held that the plaintiff was the illegitimate son of Pirappa and was entitled to one-half share in the property

On appeal, the District Judge, confirmed the decree

The defendant preferred a second appeal

J R Gharpure, for the appellant

K H Kelkar, for the respondent

SHAH, J —One Pirappa by caste a Lingayat died in 1907 leaving him surviving a wife, Limbabai, who had no issue a Mohatar wife who had two daughters and the present plaintiff who claims to be his illegitimate son by a concubine Sitabai, who was by caste a Shimpi woman All these persons except the plaintiff and the defendant who is one of the daughters by the Mohatar wife, are dead

The plaintiff sued to recover possession of the property of Pirappa from the defendant The defendant urged that the plaintiff had really no interest in the property as he could not claim the position and rights of a *dasi putra* according to Hindu Law, and it was also urged that the connection between Sitabai and Pirappa being adulterous and forbidden by law, the text applicable to a *dasi putra* would not apply to the plaintiff

The plaintiff's claim for the whole property was not allowed, but it was found that he was a *dasi putra* and as such entitled to a moiety of the property in suit, and a decree was passed by the trial Court on that footing The lower appellate Court has affirmed the decision of the trial Court

It is found by both the lower Courts that the plaintiff is the illegitimate son of Pirappa, who had kept Sitabai as his mistress It is also found that Sitabai's husband died when she was very young, and that she was a widow living with Pirappa, when the present plaintiff was born

It is common ground that the parties are governed by the law applicable to Sudras

Mr Gharpure's first contention is that the plaintiff is not a *dasi putra*, that he is born of an adulterous connection forbidden by law, and that the texts relating to an illegitimate son do not apply to him It is clear, however, that the condition that the Sudra woman of whom the illegitimate son is born, should never have been married to any man has been discarded in the Presidency of Bombay as pointed out by Sir Michael Westropp, C J in *Rahi v Govinda valad Teja*[1] It is also observed in the same case at page 115 of the report and the observation is repeated in the later case of *Sadu v Baiza*[2] that among Sudras the illegitimate

[1] (1875) 1 Bom 97 at p 113   [2] (1878) 4 Bom. 37 at p 54

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sons of a kept woman or concubine are on the same level as to inheritance as the *dasi putra* or the son of a female slave by a Sudra It is clear that Sitabai's connection with Pirappa as his mistress being established, the present plaintiff, who was born when that connection subsisted, must be treated as the illegitimate son of Pirappa and is entitled to all the rights, which a *dasi putra* would be entitled to on the facts of this case

The second question raised in the course of the argument is that in any case the lower Courts are wrong in allowing the plaintiff a moiety of the whole property, and that the plaintiff is entitled to a moiety of the defendant's share, i e, to one third of the whole estate This point was not raised in either of the Courts below and has not been taken in the memorandum of appeal here We have allowed the point to be argued, though not without reluctance, as it was pressed upon our attention as a point of law not involving any fresh finding of fact An examination of the texts and the decided cases bearing on the point shows that the point is by no means easy to decide We feel certain, however, that whatever may be the proper share to be awarded to the plaintiff it could not be more than one-third of the whole estate

At the outset it may be mentioned that Pirappa had two daughters But it is not suggested by Mr Gharpure that on that ground on the footing upon which he argues for the plaintiff's share being one-third his share would be really one-fifth of the whole estate This aspect of the question has not been put forward in the argument, and we mention it only for the purpose of making it clear that the extent of the plaintiff's share is determined on the footing that Pirappa had only one daughter

The fact that Pirappa left two widows behind him, makes in our opinion no difference in the *extent* of the plaintiff's share The point whether in the case of daughters and an illegitimate son, the widow of the deceased has only a right of maintenance or takes the estate of the deceased to the exclusion of the daughters is a point upon which there has been some difference of opinion but that question really does not arise in this case It is enough to point out that it has nothing to do with the extent of the illegitimate son's share which must be determined with reference to the number of legitimate sons or daughters or daughters sons The question of the extent of the illegitimate son's share has not been considered and decided in any of the cases bearing on the widow's right, which only dealt with the point whether she had any right to the property either when there were illegitimate sons or when there were legitimate daughters and illegitimate sons

The provision as to the extent of an illegitimate son's share is to be found in the Mitakshara, Chapter I, Section XII, placita 1 and 2 (see Stokes Hindu Law Books p 426) Yajnyavalkya's text (Vyavaharadhyaya, verse No 134) contains the word *ardhabhagika* (अर्धभागिक), which is translated by Colebrooke as partaker of the moiety of a share It is explained in the commentary by Vijnaneswara that after (the demise of) the father, *if there be sons of a wedded wife, let these* brothers allow the son of the female slave to participate for half a share that is let them give him half (as much as is the amount of one brother's) allotment It is further pointed out that if there be daughters of a wife, the son of the female slave participates for half a share only Speaking with reference to the daughters Vijnaneswara uses the word *ardhabhagika* (अर्धभागिक) about the illegitimate son, which is the word used in Yajnavalkya's text, and which has been exp

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by him in the previous part of the commentary with reference to the sons of a wedded wife as meaning a share to the extent of one-half in a brother's allotment Having regard to the context as well as the language used by Vijnaneswara, there can be no doubt that the illegitimate son in competition with a legitimate daughter would have the same share as he would have in competition with a legitimate son It may be that in some decided cases this view may not be found to have been uniformly acted upon But there is no discussion on this point and we feel quite clear that the illegitimate son's share in this case should be calculated on that footing

The question, however, as to the extent of that share is not so free from difficulty There are two methods of determining the extent of the share One method is to divide the whole estate in such a way as to give to each of the illegitimate sons exactly half of the share of each of the legitimate sons The other method is to divide the estate into as many shares as there may be sons, treating the illegitimate sons as legitimate sons and then from one share to give half to each illegitimate son, and give the remainder to the legitimate sons To take the simplest instance, if there be one legitimate son and one illegitimate son, according to the first method, the whole estate would be divided into three shares, two shares going to the legitimate son and one share to the illegitimate son According to the other method the estate would be divided into two shares, and the illegitimate son will be given half of one share, that is one-fourth of the whole estate, and the remaining portion, that is three fourths of the whole will go to the legitimate son This second method has been adopted by Vijnaneswara himself in dealing with the share of a sister It has been explained by him at length in Chapter I, Section VII, placita 6 to 10 (Stokes'

Hindu Law Books, pp 398—400) If we had to make a choice between the two methods for the first time, as a matter of proper construction we should have been inclined to adopt the second method The expression explained in Section VII, placita 6 to 10 by Vijnaneswara is *Nyadanshat* (निजादंशात्) which is used by Yajnavalkya in verse No 124 while the expression used by him in Section XII, pl 2, is *swabhagat* (स्वभागात्) which is synonymous with the former It is, however, unnecessary to pursue this point any further, as we think that the second method of determining the extent of the illegitimate son s share cannot be accepted now, though, in our opinion, it has the merit of Vijnaneswara s approval In the first place Mr Gharpure has not argued that it is the proper method to be adopted now The decided cases in this Presidency show that it is the former method that is adopted, and the second method, though not expressly considered, must be deemed to have been rejected by necessary implication Lastly, the other High Courts also adopted the first mentioned method On a point of this kind it is important that a rule once laid down should be adhered to unless there are exceptionally strong and clear grounds to justify a departure therefrom

The case of *Dhodyela and Sanyela Ramaika* v *Malanaik*[1] decided by Melvill and Pinhey, JJ shows that the shares of the illegitimate sons were calculated according to the first method The same rule was adopted by Melvill J in *Sadu* v *Baiza*[2] Though his judgment was upset in appeal on a different ground, the learned Judges in appeal expressed a clear opinion in favour of the view of Melvill J on the point now under consideration, though it was not necessary for the decision of the case They observed (at page 52 of the report) that "If Mahadu had not survived his

[1] (1874) P J 43 [2] (1878) 4 Bom 37

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father Manaji, then, indeed, under Mitakshara, Chapter I, Section XII, pl. 2, Sidu would have been entitled to only half a share, i.e. one-third of the property, and the remaining two-thirds would have vested in Darvi as the legitimate daughter of Manaji."

The same view has been recently taken in *Chellammal v. Ranganatham Pillai*,(1) and the Allahabad High Court took the same view long ago in *Kesaree v. Samardhan*.(2)

Mr. Kelkar relied upon the case of *Shesgiri v. Girewa*(3) for the proposition that the illegitimate son would be entitled to a moiety of the estate. In that case, however, the plaintiff, who was one of the daughters, was awarded one-sixth share of the whole estate and the illegitimate sons, who were among the defendants, were allowed a moiety of the whole by the District Court. The illegitimate sons appealed against the decree and the plaintiff-daughter had filed no cross objections. The only point urged before, and decided by, the High Court was, whether the illegitimate sons excluded the widow and the daughters altogether. The true extent of the plaintiff daughter's share was not decided by the High Court. The remark of Sir Charles Sargent, C.J. that the illegitimate sons were entitled to a half share, apparently based upon the observation of Sir Michael Westropp, C.J. in *Rahi v. Govinda valad Teja*(4), is apt to be misunderstood. No doubt, at p. 115 of the report of *Rahi v. Govinda valad Teja*(4), it is stated that the illegitimate son is entitled to a half share. But in order to understand whether it was half of the whole estate or half of a legitimate son's share, it is necessary to bear in mind the observations at page 104 of the report, where Sir Michael Westropp, C.J.,

(1) (1910) 34 Mad. 277.
(2) (1873) 5 N.W.P.H.C.R. 94.
(3) (1889) 14 Bom. 282.
(4) (1875) 1 Bom. 97 at p. 113.

after referring to the Mitakshara, Chapter I, Section XII observes that "If there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son and such daughter or daughter's son would take the residue of the property. Even if there be any doubt as to what was meant by that passage Sir Michael Westropp's dictum in the later case of *Sadu v. Baiza*[1] which is already quoted, makes the meaning abundantly clear. There is no reason to suppose that Sir Charles Sargent did not understand Sir Michael Westropp's observation in that sense and though the decree of the District Court in *Shesgiri's* case may not be consistent with the view, which we have already expressed as being the correct view to take of the extent of the illegitimate son's share, it is clear that there is nothing in the decision of the High Court which is inconsistent with that view. The point considered and decided in *Meenakshi Anni v. Appakutti*[2] was that the widow did not exclude the illegitimate sons altogether. The question as to the extent of the illegitimate son's share in competition with a legitimate daughter apparently did not arise in that case and was not decided.

For these reasons we are of opinion that the plaintiff is not entitled to more than a third of the property in suit. We accordingly modify the decree of the lower appellate Court by directing that the plaintiff should be awarded on partition one-third of the property in suit. In other respects the decree should be confirmed. Under the circumstances the appellant must pay the respondent's costs of this appeal, as the grounds mentioned in the memorandum of appeal have failed.

Decree modified.

J. G. R.

[1] (1878) 4 Bom. 37.

[2] (1909 33 Mad. 226.

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

1916
January 6

NARAYAN RAMKRISHNA PANDIT AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS v VIGHNESHWAR GANAPATI HEGDE AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS *

Construction of document—Sale or mortgage—Sale with option of re purchase —Transfer of Property Act (IV of 1882) section 58 clause (c)

The plaintiffs mortgaged in 1899 with the defendants 92 fields for Rs 8 000 the rate of interest agreed upon being 8 per cent per annum In 1904 the parties made up accounts under the mortgage and of other transaction and the plaintiffs were found indebted to the defendants for Rs 13 000 To pay the amount the plaintiffs sold to the defendants 20 out of 92 fields mortgaged The sale deed contained the provision that if within the period of 20 years the plaintiffs repaid Rs 13 000 in one lump sum or in instalments the defendants should reconvey the lands to the plaintiffs On the same day the plaintiffs executed to the defendants a permanent lease of the lands sold at a fixed annual rental of Rs 412 8 0 The plaintiffs alleged that the transaction of 1904 was a mortgage and sued to redeem the same in 1911 on accounts being taken under the Dekkhan Agriculturists Relief Act —

Held that the transaction in dispute was not a mortgage but a sale with an option to the plaintiffs to repurchase

FIRST appeal from the decision of T V Kalsulkar, First Class Subordinate Judge at Karwar

Suit to redeem a mortgage

On the 2nd August 1899 the plaintiffs mortgaged with the defendants 92 fields for Rs 8,000, the rate of interest agreed upon being 8 per cent per annum

In 1904 the parties made up accounts of moneys due on the mortgage and other transactions between the parties with the result that the plaintiffs were found indebted to the defendants in the sum of Rs 13,000 The plaintiffs discharged the debt by sale to the defendants of 20 out of 92 fields mortgaged with them The

* First Appeal No 237 of 1913

sale deed which was executed on the 4th August 1904 contained a stipulation that if the plaintiffs repaid Rs 13,000 in one lump sum or in instalments to the defendants within 20 years, they were to reconvey the lands to the plaintiffs The material provisions of the sale-deed were as follows —

The principal amount to be paid to you in respect of the said mortgage deed is Rs 8 000 the amount settled in respect of interest up to this time on the same is Rs 3 000 making in all Rs 11 000 amount of Rs 2 000 settled in respect of the principal and interest of the promissory note for Rs 1944 14 0 given in writing on the date the 26th of January 1904 in favour of your elder brother Ramakrishna by (1) Vishnu Hegde the plaintiff No 1 and the interest thereon for purposes of the debts incurred for the necessity of the family so in all Rs 13 000 (thirteen thousand) are due to you from our family up to this date It was not convenient to pay you this amount for the reasons mentioned above Moreover excessive interest is to be paid for the said debt and if by reason of the inconvenience to pay it from the income of the family lands the amount remains unpaid it appeared that great loss might be caused to the family So all of us who are members of the family considered (this matter) and thought (decided) that we should sell some lands to you and redeem the remaining lands from the mortgage encumbrance and should include in this sale deed all the debts incurred by our family up to this time in full satisfaction of our debts and that if in future any debt is required by the family and if it is really required it is to be contracted by Nos 1 and 2 out of us who carry on *vahivat* of our family with the consent of all the remaining members of our family and that if any (debt) be incurred by the said two persons unless it is proved that it was incurred for the family that debt is not to affect the rights of the share of other persons of the family We have entered into an agreement as above and on informing you that we are going to make a sale to you for the amount of the said debt of Rs 13 000 (thirteen thousand) you agreed to it and so the property mentioned below is sold to you (in respect of the said amount)

We have sold you the right title and interest that we (and) our family have over the above mentioned lands Therefore we shall get the *khata* paying the said assessment transferred to your name Therefore you should pay every year Government assessment from the December instalment of this year and expend as much money for improvement on them as you please and enjoy them from generation to generation

If from this date up to 20 years between the beginning of July to the end of August we go on paying (every year) Rs 650 (six hundred and fifty rupees)

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NARAYAN RAMKRISHNA v. VICHNESHWAR

or more than that amount out of the amount of sale you should accept the same and should go on deducting a proportionate amount from the profits Rs 412-8-0 (four hundred and twelve rupees and eight annas) in respect of the lands relating to this sale If we and the members of our family also pay the whole amount of sale in 20 years by one lump sum or (by amounts) as mentioned above you should deliver back the right of this sale to us and to the members of our family the cost having been paid by us and you half and half This condition is not to apply after 20 years

On the same day the plaintiffs executed in favour of the defendants a perpetual lease of the lands sold at a fixed annual rental of Rs 112-8-0 It contained a provision that—

If we pay any amount out of the amount in respect of the said sale deed we shall deduct rent in proportion to the amount paid thus and go on paying the remaining rent

In 1911 the plaintiffs, alleging that the sale-deed of 1904 was a mortgage sued to redeem it on accounts being taken under the provisions of the Dekkhan Agriculturists' Relief Act

The Subordinate Judge decreed the claim, holding that the sale of 1904 was a mortgage, on the following grounds —

The terms about paying off Rs 13,000 in Exhibit 25 by instalments of Rs 650 or paying of the whole sum of Rs 13,000 in 20 years appears to have been added later on in Exhibit 25 and a corresponding diminution in the payment of rent is provided for in Exhibit 34 These terms were added and the documents were complete on the 26th September 1904 But for the addition of these terms the deed (Exhibit 25) would have been a sale But with the addition of the terms the deed becomes a mortgage by conditional sale because there is a condition in Exhibit 25 that the sale shall become void on payment of Rs 13,000 by instalments or in a lump sum within 20 years *vide* clause (c) s 58 of the Transfer of Property Act (IV of 1882) Under the circumstances it is not necessary to find out the indications which determine any transaction to be a mortgage *vide* *Maruti bin Amriti* v *Balyi bin Babaji Patel* 2 Bom L R 1058 Hence it is not necessary to go into the question as to why defendants were content with such a low rate of interest as rupees three and annas two per cent and why defendant left out some of the lands at the time of Exhibit 25 which were mortgaged to them

previously (Exhibits 25 29 and 34) There is not the slightest doubt that Exhibit 25 is a mortgage although ostensibly it is a sale

The defendants appealed to the High Court

Coyajee with *S S Patkar* (Government Pleader) for the appellants —The deed in question is out and out sale with a condition of re-purchase As no extraneous evidence has been adduced to show the intention of the parties, the intention has to be gathered from the document itself The recitals and conditions therein and past transactions between the parties conclusively prove that it was a sale deed see *Bhagwan Sahai* v *Bhagwan Din* [1] and *Vasudeo* v *Bhau* [2]

Bhandarkar with *G P Murdeshwar* for the respondent —The deed is one of mortgage All the indications of a mortgage are present there We are in possession we pay a fixed rent and we have all along paid the assessment see *Kasturchand Lakhmaji* v *Jakhia Padia* [3] *Madhavrao Keshavrao* v *Sahebrao Ganpatrao* [4]

BATCHELOR J —The only question involved in this appeal is, whether the document Exhibit 25, executed by the plaintiffs in favour of the defendants, is, as on its face it purports to be a sale, or is in reality a mortgage in the guise of a sale The plaintiffs' suit was brought to redeem the mortgage which, as the plaintiffs alleged was effected by this Exhibit 25 so that admittedly the suit must fail if it should be held that no mortgage is created by this document

The learned Judge below was of opinion that Exhibit 25 was in reality a mortgage and the grounds of this opinion are stated by him in the following words after referring to the terms providing for the

(1) (1890) 12 All 387

(2) (1896) 21 Bom 528

(3) (1915) 40 Bom 74

(4) (1914) 39 Bom 119

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condition to repurchase the property after the lapse of twenty years, the Judge says —

> But for the addition of these terms the deed (Exhibit 25) would have been a sale But with the addition of the terms the deed becomes a mortgage by conditional sale because there is a condition in Exhibit 25 that the sale should become void on payment of Rs 13 000 by instalments or in a lump sum within twenty years [*vide* clause (*c*) section 58 of the Transfer of Property Act] Under the circumstances it is not necessary to find out the indications which determine any transaction to be a mortgage

But it seems to me clear that the question, whether Exhibit 25 effects a mortgage or a sale, is not to be answered by mere reference to clause (*c*) of section 58 of the Transfer of Property Act And, if I am not mistaken, to decide the point upon this view is to assume what is really in dispute For, section 58 of the Transfer of Property Act defines what a mortgage is, and clause (*c*) of the section describes one method of effecting a mortgage, viz, the method of mortgaging by conditional sale But the words of clause (*c*) are to be read not in an isolated manner, but in reference to the first paragraph of the section, and when they are so read, it will be manifest that clause (*c*) comes into play only when there is a mortgage as that term has been defined Now from the definition itself there is no mortgage except where there is a transfer of an interest in specific immoveable property for the purpose of securing the payment of a debt, and the whole question involved in this debate is, whether the Rs 13,000 paid for the lands transferred by Exhibit 25, was an out and out price paid for land sold or was a continuing debt secured by a transfer of the immoveable property To decide between these two theories we must look at the intentions of the parties as those intentions have been disclosed in the documents executed As was said by Lord Chancellor Cranworth in *Alderson* v *White*[1]

[1] (1858) 2 DeG & J 97 at p 105

"In every such case the question is, what, upon a fair construction is the meaning of the instruments?" Now the material passage in the principal instrument, Exhibit 25, after referring to the execution of prior mortgages, recites that in all Rs 13 000 are found due to the defendants by the plaintiffs at the date of the document Then the instrument continues —

> It was not convenient to pay you this amount for the reasons mentioned above Moreover excessive interest is to be paid for the said debt and if by reason of the inconvenience to pay it from the income of the family lands the amount remains unpaid it appeared that great loss might be caused to the family So all of us who are members of the family considered this matter and decided that we should sell some lands to you and redeem the remaining lands from the mortgage encumbrance and should include in this sale deed all the debts incurred by our family up to this time in full satisfaction of our debt

Now pausing there it seems to me difficult to imagine language more clearly and unequivocably expressive of a sale as opposed to a mortgage There is no ambiguity in the minds of the parties who themselves refer to the pre existing mortgage and in contrast with it declare that they now effect a sale for the precise purpose of extinguishing the debt which had been secured by this mortgage That is the contract which the parties in the plainest possible language have set their hands to Is there anything in the rest of the case to indicate that this, the plain meaning of Exhibit 25 is not the meaning which the parties intended and which the Court should now enforce? The sole circumstance to which the respondents plaintiffs were able to point is the last passage occurring in Exhibit 34, the permanent lease which the defendants gave to the plaintiffs on the 6th August 1904 By these words it is provided that "if we (the plaintiffs) pay any amount out of the amount in respect of the said sale-deed, we shall deduct rent in proportion to the amount paid thus and go on paying the remaining

rent" It may be that if there were in the case any substantial consideration in plaintiffs' favour the Court might see its way to draw an inference in their favour from this provision But when all the circumstances are considered, it appears to me that this provision carries the case no further than it is carried by the condition that it shall be open to the plaintiffs at any time within twenty years to repurchase the land by payment of the price either in a lump sum or in instalments Clearly, however, the mere giving of an option to the plaintiffs to repurchase the land does not of itself operate to create a mortgage And when attention is paid to other circumstances appearing on the record, the theory of a mortgage must be set aside Admittedly when Exhibit 25 was executed, the defendants already had a mortgage on the lands transferred by Exhibit 25 Since that mortgage the debt due to them had increased from Rs 8,000 to Rs 13,000 And yet if the plaintiffs case is right, the creditor is content to take only a further mortgage on the 20 lands transferred by Exhibit 25 and give up the security which under the pre existing mortgage he already had on seventy two other lands belonging to the debtors

Moreover, the documents make no provision for the payment of interest It is said that the Rs 412 reserved as annual rent under Exhibit 34 may properly be regarded as interest running on the Rs 13,000 But even that theory does not assist the plaintiffs For upon that footing the creditor is content to receive only interest at the unusual and unusually low rate of $3\frac{1}{8}$ per cent whereas his earlier mortgage gave him interest at 8 per cent There is no provision in the documents for the taking of any accounts, although the documents provide that the purchasers may spend any sum they like on improving the property The documents lay down that in the event of repurchase by the

plaintiffs, the costs of this repurchase are to be borne half and half between the plaintiffs and the defendants, and it seems to me extremely unlikely that if this transaction were in truth a mortgage the mortgagee would consent to bear half the expenses of the re-conveyance

I notice lastly, that it is not suggested that the Rs 13,000, the consideration of Exhibit 25 is not a fair price for the lands conveyed by that instrument

On the whole, therefore, though I have not overlooked the general considerations to which I referred in *Kasturchand Lakhmaji* v *Jakhia Padia* (1), I am of opinion that in this particular case upon these particular documents it is impossible to avoid the conclusion that the transaction must be accepted as being in reality that which in the plainest language both parties declared it to be, viz , a transaction of sale with an option to the plaintiffs to repurchase

On these grounds, in my opinion, the appeal must be allowed and the plaintiffs' suit must be dismissed with costs throughout

SHAH, J —I am of the same opinion

Appeal allowed

R R

(1) (1915) 40 Bom 74

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January 17

ORIGINAL CIVIL

Before Mr Justice Macleod

SHAVAKSHAW D DAVAR PLAINTIFF v TYAB HAJI AYUB DEFENDANT *

Civil Procedure Code (Act V of 1908) section 89 Order XXIII Rule 3 Second Schedule paragraphs 14 15 20 and 21—Civil Procedure Code (Act XIV of 1882) section 375—Indian Arbitration Act (IX of 1899)—Reference to arbitration without intervention of Court while suit pending—Procedure to enforce award—Award not adjustment of suit under Order XXIII rule 3

The plaintiff sued on the 11th of June 1915 to recover a sum of Rs 5 353 9 6 as the price of goods sold to the defendant The defendant in his written statement pleaded *inter alia* that the goods supplied by the plaintiff were not of the quality agreed upon by the parties On the 21st of August 1915 the parties without the intervention of the Court agreed to refer the matters in dispute between them concerning the contract referred to in the plaint in respect of which the suit had been filed in the High Court to the arbitration of M D and R M The arbitrators made their award on the 28th of October 1915 whereby they awarded to the plaintiff a sum of Rs 4 001 4 0 with interest at 6 per cent till the date of payment The award was filed by the arbitrators on the 10th of December 1915 On the 10th of January 1916 the plaintiff took out a notice of motion for an order that the adjustment of the suit arrived at between the plaintiff and the defendant as stated in the plaintiff's affidavit should be recorded under Order XXIII Rule 3 of the Civil Procedure Code and a decree in accordance therewith should be passed The defendant disputed the legality of the award on two grounds first that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide and secondly that they refused an opportunity to the defendant to call witnesses or that after they had given him to understand they would adjourn the matter to enable him to call evidence they published the award without giving him any such opportunity

Held (1) the plaintiff had adopted a wrong procedure in applying for a decree on an award under Order XXIII Rule 3

(2) that the defendant was entitled to be heard on the objections raised by him under paragraph 21 of the Second Schedule of the Civil Procedure Code

Pragdas v Girdhardas[1] and *Ghellabhai v Nandubai*[2] considered

Per MACLEOD J —No application can be made to obtain a decree on an award except as provided in section 89 of the Code of Civil Procedure Act V

* O C J Suit No 631 of 1915

[1] (1901) 26 Bom 76 [2] (1896) 21 Bom 335

of 1908 Under that section the provisions of the Second Schedule govern all abitrations in a suit or otherwise except such arbitrations as are specially excluded An arbitration between the parties to a suit without an order of the Court has not been excluded and must therefore come under the provisions which deal with arbitrations without the intervention of the Court

MOTION

Application under Order XXIII, Rule 3

The plaintiff was a flour merchant carrying on business in Bombay under the name and style of Boyce Spice and Flour Mills The defendant was also a flour merchant

On the 17th of March 1915 the defendant agreed to purchase 758 bags of flour called Atta No 3 at Rs 11 per bag of 196 pounds net Bombay all other expenses to be paid by the defendant and the payment of the price was to be made within eight days from the delivery which was to be taken by the defendant at the Boyce Spice and Flour Mills On the 22nd of March 1915 the plaintiff delivered to the defendant 486 bags out of the said 758 bags of Atta No 3 at the aforesaid Mills and the price was calculated at Rs 5,353-9 6

The defendant having failed to pay the aforesaid amount, the plaintiff filed the present suit on the 11th of June 1915 The defendant in his written statement pleaded that the flour supplied by the plaintiff was not in accordance with the quality agreed upon and that the stuff was rotten and relied upon a report made by his own surveyor

After the written statement was filed the parties came to an arrangement whereby the matters in dispute between the parties were referred to the arbitration of two gentlemen, by name Motilal Dayaram and Ramji Meghji, appointed by the defendant and the plaintiff, respectively

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SHAVAKSHAW v TYAB HAJI AYUB

The arbitrators made and published their award on the 28th day of October 1915 whereby they awarded to the plaintiff the sum of Rs 4,001-4-0 being the value of 486 bags at Rs 8-4-0 a bag together with interest at the rate of 6 per cent till the date of payment, each party to bear his own costs The arbitrators filed their award in Court under the Indian Arbitration Act on 10th of December 1915

The plaintiff subsequently took out a notice of motion on the 10th of January 1916 and applied for a decree on the award on the basis of the adjustment of the suit under Order XXIII, Rule 3

The defendant disputed the award on two grounds—(1) that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide viz, that they erred in allowing Rs 4,001-4 0 when the plaintiff had claimed Rs 5,353 they not having the power to reduce the amount, (2) the arbitrators refused an opportunity to the defendant to call witnesses or that after they had given him to understand that they would adjourn the matter to enable him to call evidence, they published the award without giving him any such opportunity The defendant accordingly resisted the plaintiff's application and claimed to be heard on his objections contending that the right procedure should be that laid down in the Second Schedule to the Civil Procedure Code

M R Jardine (Advocate-General), for the plaintiff

Strangman, for the defendant

MACLEOD, J —This is a motion taken out by the plaintiff for an order that the adjustment of the suit arrived at between the plaintiff and the defendant, as stated in the plaintiff's affidavit, should be recorded and that a decree in accordance therewith should be passed

The suit was filed on the 11th of June 1915, the plaintiff praying that the defendant might be ordered and decreed to pay to the plaintiff the sum of Rs 5,353 9-6 as the price of goods sold On the 21st of August 1915, the parties without the intervention of the Court agreed to refer the matters in dispute between them concerning the contract referred to in the plaint to the arbitration of Motilal Dayaram and Ramji Meghji The arbitrators made their award on the 28th of October 1915 The award was filed on the 10th of December In my opinion a wrong procedure has been adopted Order XXIII Rule 3 of the Civil Procedure Code of 1908 under which the application is made only refers to the adjustments of suits wholly or in part by any lawful agreement or compromise No application can be made to obtain a decree on an award except as provided for in section 89 of the Code That was entirely a new section It runs as follows —

> Save in so far as is otherwise provided by the Indian Arbitration Act 1899 or by any other law for the time being in force all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule

If it had been intended that a party might apply for a decree on an award under Order XXIII, Rule 3 that Rule would have been mentioned in section 89 along with the provisions of the Second Schedule

It is suggested that Order XXIII, Rule 3, comes under the description of 'any other law for the time being in force but there is no reference in Order XXIII, Rule 3 to arbitration proceedings I am aware of the decision in *Pragdas v Girdhardas*[1] but since the Civil Procedure Code of 1908 came into force I do not think that decision can be any longer binding on me It seems that

(1) (1901) 26 Bom 76

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the opinion formerly held good as stated by Farran C J in *Ghellabhai* v *Nandubai*(1), that there was no section of the Civil Procedure Code of 1882 which specially enabled a Court to take cognizance of a submission to arbitration of a matter in issue in a suit made pending the suit *other than a submission through the Court*, or of an award made upon such a submission, and that such a submission and award could only be taken cognizance of in the same suit as an adjustment under section 375 of the Civil Procedure Code of 1882 now represented by Order XXIII, Rule 3 However that may be it seems clear that under section 89 the provisions of the Second Schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded An *arbitration between the parties to a suit* without an order of the Court has not been excluded and must, therefore, come under the provisions which deal with arbitrations without the intervention of the Court I do not see myself why the words "without the intervention of the Court" should not refer to cases where the agreement of reference is made out of Court although the parties to the agreement are already parties to a suit, and in my opinion section 89 is now conclusive on the question

It seems obvious that if an application for a decree on an award could be made under Order *XXIII, Rule* 3 as soon as it has been proved to the Court that there has been an agreement to refer and an award, the Court would be bound to order the award to be recorded as an agreement or compromise, and would be bound to pass a decree in accordance therewith, excluding all the provisions of the Second Schedule relating to the powers of the Court when an application is made for a decree on an award Paragraph 20 and the following paragraphs of the Second Schedule refer to arbitration

(1) (1896) 21 Bom 335 at p 341

without the intervention of the Court and under paragraph 21 where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, *and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved*, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 gives the Courts power to remit the award under certain circumstances to the arbitrator. Paragraph 15 gives the Courts power on certain grounds to set aside an award. Therefore, in my opinion there is no other law at present in force except the Arbitration Act of 1899 and a party applying to the Court for a decree on an award is bound, if the case does not come within that Act, to apply to the Court under the Second Schedule.

The defendant now disputes the legality of the award on two grounds: first, that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide, and secondly, that they refused an opportunity to the defendant to call witnesses or that after they had given him to understand that they would adjourn the matter to enable him to call evidence they published their award without giving him any such opportunity. I think the defendant is entitled to raise those objections and be heard upon them. Therefore the application by consent is now to be treated as an application under paragraph 21 of the Second Schedule and can be set down for hearing on præcipe in order to decide those questions. Costs to be costs in the application.

Attorneys for the plaintiff: Messrs. *Vachha & Co.*

Attorneys for the defendant: Messrs. *Mulla & Mulla.*

G. G. N.

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

1916 THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT) APPELLANT *v* GULAM RASUL GYASUDIN KUWA (ORIGINAL PLAINTIFF) RESPONDENT*

January 24

Civil Procedure Code (Act V of 1908) section 80—Notice of suit—Suit against Government—Government threatening to demolish property the subject of suit—Suit within two months of the notice

On the 2nd May 1912 the plaintiff gave notice to Government under section 80 of the Civil Procedure Code (Act V of 1908) of a suit which he intended to file for a declaration of ownership of certain property Shortly afterwards the Mamlatdar threatened to demolish the property which was the subject matter of the notice The plaintiff thereupon filed the present suit against Government on the 19th June 1912 The defendant contended that the suit was bad under section 80 as having been instituted within two months of the date of the notice

Held that the suit was not bad under section 80 inasmuch as the defendant's agent had during the currency of the notice threatened to demolish the property in dispute

APPEAL against the decision of J D Dikshit, District Judge of Thana

The plaintiff owned a house at Badlapur In front of the house was an open piece of land, on which he erected a *padvi* (a roofed verandah)

On the 13th January 1911, the Assistant Collector gave a notice to the plaintiff under section 202 of the Bombay Land Revenue Code calling upon him to remove the *padvi* as the land belonged to Government

On the 2nd May 1912, the plaintiff gave notice of suit to Government under section 80 of the Civil Procedure Code

* First Appeal No 187 of 1913

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Shortly afterwards, the Mamlatdar threatened the plaintiff that he was going to demolish the *padi*.

The plaintiff thereupon instituted the present suit on the 19th June 1912 praying for a declaration that the land in dispute belonged to the plaintiff and for an injunction restraining the defendant from interfering with the plaintiff in the enjoyment of his property.

The defendant contended *inter alia* that the suit was bad for want of notice under section 80 for more than two months before the filing of the suit.

The District Judge held that the land in dispute belonged to the plaintiff and decreed the suit in plaintiff's favour. He held that the suit was not bad for want of proper notice under section 80 of the Civil Procedure Code on the following grounds:—

In the present case the proper legal notice was given and while the notice was running demolition of the building was threatened. In the notice given the relief intended to be sought is mentioned i.e. the declaration of the plaintiff's ownership and an order of the Court allowing him to retain his building. In the plaint the additional relief sought is by way of an injunction restraining the defendant from demolishing the building. New circumstances came into existence since the giving of the notice and an imminent and immediate injury to the property was apprehended. Just as a party is bound not to bring a suit before the expiration of the period prescribed in the same way when a notice is already given by a party it seems to me to be the duty of Government to wait till the expiry of that period otherwise anomalous results would follow. Here a man is precluded by law from instituting the suit while the notice is running and consequently obtaining an injunction and there the officers would effect the mischief before he can run for relief to a Court of Justice. Such a result in my opinion was never contemplated by the Legislature. The learned Government Pleader relied upon the following cases: *The Secretary of State v. Gajanan* (13 Bom. L. R. 273, 35 Bom. 365), *Sakharam v. Secretary of State* (14 Bom. L. R. 353) and the observations at p. 1151 of *Naginlal v. The Official Assignee* (14 Bom. L. R. 1148) while on the other hand the plaintiff's pleader relied on the *ratio decidendi* in the last mentioned case. I myself went through many other cases including I. L. R. 7 Cal. 499, 15 Cal. 259, 29 All. 567, 14 Bom. L. R. 577 and 12 Bom. L. R. 825. In none of these cases notice as required by law had been given. In the present case the notice

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was given but the suit was brought before the expiration of the two months period The rulings in these cases therefore have hardly any application to the present case

The defendant appealed to the High Court

S S Pathak, Government Pleader, for the appellant

M R Bodas, for the respondent

BATCHELOR, J —This is an appeal by the Secretary of State who was the defendant in the original suit That suit was brought by the plaintiff for a declaration that a piece of land forming an open space in front of his house belonged to him and for a perpetual injunction restraining the defendant from interfering with his enjoyment of it

Of the three points urged in appeal by the learned Government Pleader, the first is the question of fact whether the plaintiff had proved his title Now the evidence in favour of the plaintiff upon this point is, it is not disputed, sufficient and convincing, unless the effect of it can be removed by the consideration which formed the basis of Sir Charles Sargent's decision in *Framji Cursetji* v *Goculdas Madhowji*,(1) where the learned Chief Justice pointed out that in this country slight acts of user were insufficient to give a title to land by adverse possession That, however, was a very different case from the one which we are now considering For, it was a case where a private plaintiff complained that his land had been encroached upon and the private defendant justified the encroachment by pleading that adverse possession had given him title to the property Here we are dealing with the claim to a piece of land situated in a village which has not been surveyed or measured The only evidence open to the plaintiff to establish his title would be such

(1) (1892) 16 Bom 338

evidence of user as he has given, and the acts of user are, in my opinion, of a far more significant and important character than those which were before Sir Charles Sargent. I agree with the learned District Judge in thinking that the evidence adduced by the plaintiff on the question of title proves the plaintiff's case on that point.

That being so, the second objection raised by the appellant seems to me also to fail. The objection is based upon Article 14 of the Limitation Act and section 202 of the Bombay Land Revenue Code. But admittedly the order made by the Assistant Collector under section 202 of the Bombay Land Revenue Code was made without jurisdiction and was in law and in fact a nullity if the land was—as we now hold that it was—the private property of the plaintiff. Since, therefore, the Assistant Collector's order was a nullity, it was not incumbent on the plaintiff suing for this declaration, to pray also that that order should be set aside: see the case of *Sivannanna v. Secretary of State for India*[1] and the observations of Mr. Justice Batty in the case of *Balvant Ramchandra v. The Secretary of State*.[2]

There remains only the third point taken on behalf of the appellant by the learned Government Pleader, and that point turns upon section 80 of the Civil Procedure Code which requires a plaintiff suing the Secretary of State to give two months' notice before the suit is instituted. The plaintiff gave the notice required on the 2nd May 1912. But on the 19th June 1912, i.e., before the expiry of the two months, he filed this present suit. At first sight, therefore, the suit would seem to be bad for want of due legal notice. But the plaintiff justifies his suit on the ground that

(1) (1900) 24 Bom. 435. (2) (1905) 29 Bom. 480 at pp. 488, 489.

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during the currency of his notice he was compelled to precipitate the institution of his suit by reason of the fact that the defendant's agent, the Mamlatdar, threatened to demolish the property which was the subject matter of the suit It is not denied in appeal that, as a matter of fact, the Mamlatdar did threaten this action In that state of the facts I think that the suit is not bad under section 80 I agree with what was said in *Secretary of State v Kalekhan*[1] to this extent that the words of section 80 countenance no distinction based only on the class or character of the suit filed, when it is filed, as here, against the Secretary of State But, in my judgment, the section is inapplicable on the present facts not by reason of the particular character of the suit, but by reason of circumstances which would equally apply to any kind of suit For, following Mr Justice Cunningham's exposition of section 424 of the Code of 1877 which corresponds with our present section 80 I am of opinion, as I said in *Naginlal Chunilal v The Official Assignee, Bombay*,[2] that the object of section 80 is to enable the Secretary of State who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice

If then, that is the object of the section which in terms allows a private litigant to sue the Secretary of State for redress, it appears to me undesirable to extend the meaning and scope of the section so as to produce this result that although a private person is empowered to sue the Secretary of State after two months notice, yet the Secretary of State's agent during the currency of the two months is to be permitted to destroy the material object which is the very subject matter of the suit In my opinion to place this construction upon

(1) (1912) 37 Mad 113 (2) (1912) 37 Bom 243

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section 80 is to attribute to the Legislature an inconsistency which ought to be avoided In reading the section, as I now read it, it appears to me that full effect is given to its object and intent, while the opposite construction leads directly to inconsistency and injustice It is small gain to a private person to enact that he may have redress against a defendant after two months' notice if, during the currency of the two months, the defendant is allowed to make redress impossible The right of suit, which is expressly granted by the Legislature cannot, in reason, be deferred until its exercise has become illusory This view has the support of the observations recorded by Mr Justice Chandavarkar and Mr Justice Heaton in the case of *Secretary of State* v *Gajanan Krishnarao* [1]

No other point has been taken in this appeal by the appellant, and I am therefore, of opinion that the appeal fails and should be dismissed with costs

SHAH, J —I am of the same opinion

Appeal dismissed

R R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Heaton

1916 February 16

GAUTAM JAYACHAND GUJAR (ORIGINAL PLAINTIFF) APPELLANT v MAL HARI BIN BAPU BHONG (ORIGINAL DEFENDANT) RESPONDENT *

Dekkhan Agriculturists Relief Act (XVII of 1879) sections 3 clause (y) and 10A—Suit for possession under a sale deed—Contemporaneous lease—Nature of suit—Intention of parties

The plaintiff relying on his sale deed of 1887 sued to recover possession of the land in s[...] alleging that the defendant held it as his tenant under a lease

(1) (1911) 35 Bom. 362 at p 365

* Second Appeal No 7 of 1915

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of even date with the sale deed The defendant pleaded that his father and not the plaintiff was the purchaser under the deed of 1887 that the plaintiff was the savkar (creditor) who advanced money and the payment of interest was secured by the contemporaneous lease Both the lower Courts went into the question of intention of the parties under section 10A of the Dekkhan Agriculturists Relief Act and found the defendant s case established on facts On appeal to the High Court

Held that the case was rightly disposed of under section 10A of the Dekkhan Agriculturists Relief Act The nature of the suit under clause (y) of section 3 of the Act should not be determined by the frame of the plaint but by the allegations of the parties which raised the question of mortgage or no mortgage

SECOND appeal against the decision of R S Broomfield, Assistant Judge of Poona, confirming the decree passed by H K Mehta, Subordinate Judge at Baramati

Suit to recover possession

The land in suit originally belonged to one Achyut

Achyut executed a sale-deed in favour of the plaintiff on the 15th January 1887

On the same day the land was leased by plaintiff to defendant's father Bapu who had been Achyut's tenant Other leases were given to Bapu and the defendant from time to time, the last of which was dated the 12th November 1908

On the strength of the lease of 12th November 1908, the plaintiff sued to recover possession of the land from the defendant

The defendant contended that his father, and not the plaintiff was the purchaser from Achyut, that the plaintiff was the savkar who advanced money and the payment of interest was secured by the contemporaneous lease

The subordinate Judge went into the question of intention of the parties under section 10A of the

Dekkhan Agriculturists' Relief Act, and held that the land was purchased by the plaintiff in his own name on behalf of the defendant's father, the plaintiff agreeing to reconvey on payment of purchase money He, therefore, allowed the defendant to redeem the land

The District Court, on appeal, confirmed the decree

The plaintiff preferred a second appeal

D A Khare, for the appellant

K H Kelkar, for the respondent

SCOTT, C J —The plaintiff claims as the owner of the land in suit under a sale deed executed in his favour by the previous owner Achyut in 1887, and as such owner claims possession of the land from the defendant who he alleges, became his tenant under a lease of even date with the sale deed The defendant's case is that his father, and not the plaintiff, was the purchaser from Achyut, that the plaintiff was the savkar who advanced money and payment of the interest was secured by the contemporaneous lease The defendant's case has been substantially held to be established on the facts by concurrent findings of two lower Courts and we are bound by those findings

The question of law however has been raised whether this is a suit in which the real intention of the parties to the lease can be investigated under section 10A of the Dekkhan Agriculturists Relief Act as being a suit for possession of mortgaged property within the meaning of section 3 (*y*) of that Act If strictly read it may be fairly argued that that clause (*y*) should only apply to suits where the plaintiff sues as mortgagee for possession of the mortgaged property But the Dekkhan Agriculturists Relief Act must be read as a whole, and as part of the Dekkhan Agriculturists'

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Relief Act we have section 10 A which says "When ever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, &c" Now the illustrations to that section, namely, illustrations (*a*) and (*c*) show that the intention of the Legislature, when this section was enacted, was to apply the provisions to suits by a money-lender suing to enforce either a lease or a sale-deed against an agriculturist though the instrument sued on was really according to the intention of the parties in the nature of a mortgage That is exactly the case we have here and therefore, reading clause (*y*) of section 3 by the light of section 10A, we must conclude that the intention of the Legislature was that the nature of the suit under clause (*y*) should not be determined by the frame of the plaint, but by the allegations of the parties which raised the question of mortgage or no mortgage That being so, we think it cannot be doubted that the question raised upon the lease contemporaneous with the sale-deed of 1887 is a question which must be disposed of under section 10A It has been so disposed of by the lower Courts, and therefore, the point of law which has been raised must be decided in favour of the respondent We affirm the decree and dismiss the appeal with costs

Decree confirmed

J G R

ORIGINAL CIVIL

Before Mr Justice Beaman

BAI BHICAIJI AND ANOTHER (PLAINTIFFS) v PEROJSHAW JIVANJI KERAWALLA (DEFENDANT) ° 1915 *July 20*

Nuisance—Legal nuisance—Erection of horse stables when a nuisance—The Indian Easements Act (V of 1882) section 15—Degrees of nuisance—Value of expert medical evidence in a case of nuisance—Considerations of policy or abstract public rights outside the scope of inquiry—License from the Municipal Sanitary authorities for erection of stables no defence in an action for nuisance—The Indian Specific Relief Act (I of 1877)—Relief by injunction as well as damages—Plaintiffs suing as trustees interested in reversion and as residents—The Civil Procedure Code (Act V of 1908) Order I Rule 1

Prior to the year 1903 the first plaintiff was absolutely entitled to and possessed of a piece of land with a house standing thereon situate at Thakurdwar Road Bombay By an Indenture of Settlement dated the 12th of January 1903 the first plaintiff conveyed the said property to herself and her husband the second plaintiff upon trusts for the benefit of herself and her husband and their issue The defendant was the lessee for a period of 21 years commencing from 1st of January 1911 of an open piece of land adjoining the property of the plaintiffs and situate on the eastern side thereof The said piece of land was formerly used for many years and as the defendant alleged for nearly a century for tethering bullocks and keeping bullock carts up to the year 1908 when such user terminated In October 1913 the defendant erected a block of stables parallel to the length of the plaintiffs house and at a distance of about 20 to 35 feet therefrom for the accommodation of 75 horses to which was added another block for the accommodation of 35 hack carriages The plaintiffs complained that the stables erected by the defendant rendered their house uncomfortable and unhealthy and constituted a serious nuisance They also alleged that in consequence of the nuisance the tenant on the first floor vacated the same and that the plaintiff and their family suffered in health and were obliged to remove to another house The plaintiffs sued in their double capacity as trustees interested in the reversion and as actual residents praying for a perpetual injunction to restrain the defendant from the continuance or repetition of the said nuisance and for damages in the sum of Rs 1 221 for nuisance caused up to the date of the suit or in the alternative for a sum of Rs 15 000 as damages for the depreciation in value of the plaintiffs property by reason of the said nuisance

° O C J Suit No 1288 of 1914

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The defendant denied that the stables were a nuisance in law and pleaded without prejudice to his aforesaid contention—(1) that the nuisance complained of had been acquired by him as an easement (2) that the stables were erected in accordance with the Bye laws of the Bombay Municipality and the license for using them as stables was granted to him after the said premises were inspected and due inquiries made by the Municipal Commissioner and the Health Officer of Bombay and (3) that the plaintiffs were not entitled to sue in their double capacity

Held (1) that under the Indian Easements Act whatever easement may have been acquired by the owners of the land to cause a nuisance to the adjacent servient tenement by the tethering of bullocks on the vacant land admittedly came to an end in the year 1908 i e considerably more than two years before the nuisance complained of came into existence and before the date of the suit

(2) that the nuisance complained of by the plaintiffs was totally different from the nuisance which previously existed and on general principle the defence of easement could not be sustained

(3) that if the nuisance existed it was no answer to say that the defendant had conformed to the latest requirements of the Municipal Sanitary authorities and had done everything in his power and taken all reasonable precautions to prevent its existence

(4) that the stables erected by the defendant having regard to their size and their distance from the dwelling house of the plaintiffs constituted a nuisance

(5) that having regard to the comprehensive language of Order I Rule 1 of the Civil Procedure Code of 1908 there could not be any objection to the plaintiffs suing in their double capacity and that the plaintiffs were entitled to obtain relief by way of injunction and damages

A legal nuisance is rather an evasive shifting and intangible thing hard to be pinned down by a verbal definition It must always be conditioned by time and place and circumstances and the Court shall have regard to the station in life of the plaintiff and his family and the locality and the nature of the nuisance complained of *Walter* v *Selfe*[1] and *Sturges* v *Bridgman*[2] referred to

Where the nuisance was of the kind to injure the health or seriously imperil the life of those complaining of it the Court would not hesitate to prevent it by way of *injunction* but where the nuisance went no further than to diminish the comforts of human life there would always be a question whether the Court would proceed against him who causes that nuisance by injunction or compensate the sufferer in damages

(1) (1851) 4 De G & Sm 315 at p 322 (2) (1879) 11 Ch D 852

In the absence of statutory enactments no general considerations of mere policy or rather abstract public rights can be allowed to prevail against what the law recognises and always has recognised as the legal rights of the individual

The Attorney General v The Town Council of the Borough of Birmingham [1] referred to

ACTION for nuisance

One Bai Bhicaiji, a Parsee lady (the 1st plaintiff) was absolutely entitled to and possessed of a piece of land with two buildings standing thereon, situate at Thakurdwar, Bombay On the 12th of January 1903 she conveyed by an Indenture of Settlement, the said property to herself and her husband, Dorabji Framji Kumana (the 2nd plaintiff), upon certain trusts, for the benefit of herself and her husband and their issue

To the east of the said house was an open piece of land on which stood a small shed which was used as a fuel depot, and a small groundfloor building used for shops The rest of this land was vacant and was used for a number of years for tethering bullocks and keeping bullock carts The defendant took a lease of this land for 21 years from 1st of January 1913

In December 1912 the plaintiffs were informed that the defendant intended to demolish the structures standing on the said land, and in their place to erect stables for hackney carriages and horses On 23rd December 1912 the plaintiffs by their solicitors letter wrote to the defendant complaining of the nuisance that was likely to be caused to the plaintiffs' property, and requesting the defendant to refrain from erecting the intended stables Correspondence thereupon passed between the plaintiffs' attorneys and the defendant s attorneys, and the latter denied on the 8th of August 1913 that the stables when erected would prove to be a nuisance

[1] (1858) 6 W R 811

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In October 1913, the defendant completely erected a block of buildings on his own land covering 550 square yards, parallel to the whole length of one of the aforesaid buildings of the plaintiffs, and at a distance of about 20 to 30 feet therefrom for the accommodation of 75 horses Beyond that he erected another block for accommodating 35 hackney carriages

The aforesaid building of the plaintiffs consisted of a groundfloor, and three upper floors The plaintiffs with their family resided on the 2nd and 3rd floor, while the rest of the house was in the occupation of their tenants The rent derived from the ground and the 1st floor was respectively Rs 80 and 100 per month The portion of the house in the occupation of the plaintiffs and their family would have fetched according to the plaintiffs, if let, a rent of Rs 125

In para 8 of the plaint, the plaintiffs summarised their cause of action thus —

The use of the said buildings as stables is a source of continuous noises due to the stamping and kicking of horses rattling of the stable gear the grooming and stroking of the horses by their attendants and the washing of carriages and horses in the open yard and in also being a source of offensive stenches arising from the droppings of the horses and the stable litter The said droppings and the said litter attract huge masses of flies and the storage of grass and fodder attract large number of rats and the swarming of flies and rats as carriers of dangerous diseases has proved detrimental and dangerous to the health of those occupying the plaintiffs premises including the plaintiffs and their family

The plaintiffs complained that the aforesaid circumstances rendered their adjoining house uncomfortable and unhealthy and that the stables constituted a nuisance, and that in consequence of the said nuisance, they and the members of their family suffered in health and were obliged to remove to another house for some months They further stated that the tenant on the first floor vacated the same in consequence of the

said nuisance and that they were unable to find a tenant for the 1st floor The plaintiffs instituted on the 14th of November 1914 the present suit complaining that the nuisance created by the defendant, caused injury to the plaintiffs both in person and property The plaintiffs prayed for—(a) a perpetual injunction to restrain the defendant from using his buildings as stables so as to constitute a nuisance, and from the continuance or repetition of the said nuisance, (b) for damages in the sum of Rs 1,221 for the injury caused to the plaintiffs, (c) for damages in the alternative for depreciation in the value of the plaintiffs property in the sum of Rs 15,000

The plaintiffs' dwelling house ran north and south and faced east and west The defendant's stables ran along the east frontage of the plaintiffs house

The defendant denied that the stables constituted an actionable nuisance and relied upon the fact that they were erected in accordance with the Bye-laws of the Bombay Municipality and that a license was given to him after due inquiries were made by the Municipal Commissioner and the Health Officer of Bombay on a protest being lodged by the plaintiff himself Without prejudice to his said contention the defendant pleaded that the nuisance complained of had been acquired by him as an easement In support of his plea of easement he alleged that for nearly a century prior to 1908, the land was used for tethering bullocks and keeping bullock carts and it was in an extremely insanitary condition, the smells arising then being more noxious and offensive than the smells arising from the stables which were, however kept clean and in good order and were inspected every day by the Health department The defendant also contended at the hearing that the plaintiffs were not entitled to sue in their double capacity

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The plaintiffs and the defendant relied upon expert medical evidence in support of their respective contentions

Bahadurji (Acting Advocate General) with *Desai* for the plaintiffs

Jinnah and *Wadia* for the defendant

BEAMAN, J —This was a claim by the plaintiffs for injunction and damages, or damages in the alternative, against the defendant, Kerawalla, on account of the nuisance alleged to be caused to the plaintiffs by the stables of the defendant The plaintiffs are husband and wife, the lady owning the tenement building which is alleged to suffer from the nuisance This house was built in the year 1907 and Mrs Bhicaiji Kumana, the first plaintiff has since settled it on trust In the meantime she and her husband, with their family, resided up to a recent period on what are called the second and third floors of it The suit therefore, is brought by the plaintiffs in their double capacity, that is to say, as trustees interested in the reversion and as actual residents The house consists of four floors The ground floor is let to tenants of the humbler classes The first floor used to be let to Mr Katrak at a rent of Rs 80 a month The second and third floors, as I have said, were occupied by the plaintiffs and their family The defendant obtained a lease of the adjoining open land, on which formerly bullocks used to be tethered and bullock carts kept The evidence is that there was a shed and may be a shop or two on that otherwise vacant land before the defendant built his stables there These stables were completed in or about October 1913 The stables cover 550 square yards and accommodate seventy-five horses There are also half as many hack carriages which have to stand about the stables and are washed and cleaned on the spot

reserved for that purpose. The distance roughly between the defendant's stables and the plaintiffs' dwelling house may be said to be anything between twenty and thirty-five feet. Various points in respect of which complaint is made as, for example, the washing stand, are considerably more distant. But it is quite unnecessary to go into minute details of that kind.

Speaking generally, the case opens on the admitted facts that this large stable has been brought into existence within a very short distance, indeed, of the plaintiffs' dwelling-house. The plaintiffs' dwelling-house runs north and south and faces east and west. The stables run along the east frontage of the plaintiffs' house.

The defendant's first line of defence was that the nuisance complained of had been acquired by him as an easement. This rests upon such evidence as has been led to show that before the erection of the stables the land on which they now stand was used for tethering bullocks and allowing bullock carts to stand when not in use. The evidence shows that while so used the land was probably in an extremely insanitary condition, and, doubtless, residents in the vicinity might have been expected to suffer at least as much inconvenience from the smells arising from the uses to which the land was put then as from the smells arising from the uses to which it is now put. Reference was made to the case of *Crump* v. *Lambert*[1] in support of the proposition that a right to cause a nuisance might be acquired as an easement. This proposition of law has been affirmed in the Bombay High Court in the case of *Kashinath* v. *Narayan*[2]. If, however, the defence is to rest on easement, it must be governed by the Indian Easements Act and the provisions of

[1] (1867) L. R. 3 Eq. 409.

[2] (1897) 22 Bom. 831.

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section 15 of that Act are fatal to it Whatever easement may have been acquired by the owners of this land to cause a nuisance to the adjacent servient tenements by the tethering of bullocks, &c, on the vacant land admittedly came to an end in the year 1908 That is considerably more than two years before the nuisance now complained of came into existence and before the date of the suit Every period of twenty years giving a right of easement under the Indian Easements Act must end within two years of suit Moreover, the nuisances complained of being of a totally different character, that defence could not, on general principle, I think, quite apart from the special objection I have mentioned, be sustained

Nor is there anything in the defendant's contention that the plaintiffs cannot be allowed to sue as trustees to protect the reversion and as tenants injured by the nuisance The plaintiffs are landlords in respect of a considerable portion of the house and they are residents in another portion of it They claimed to have suffered actual loss of rent by reason of this nuisance and the consequent withdrawal of tenants, and they likewise claim to have suffered considerable personal discomfort and injury as residents In my opinion, there can be no objection to their suing in the double capacity having regard to the comprehensive language of Order I, Rule 1 It is true that some difficulty might be experienced in defining nicely, for the purposes of estimating damages between such loss as they may have incurred in their character as residents by actual loss of rent, and prospectively by the general depreciation of the property, and the consequent injury to the reversion These technical distinctions, however interesting theoretically, do not I think, occasion much difficulty in practice What really has to be ascertained here is whether the stables complained of

are a nuisance, and, if so, to what relief are the *plaintiffs entitled*

Now, in approaching a question of this kind we may safely be guided by the often quoted passage in the judgment of Knight Bruce V C in the case of *Walter* v *Selfe*,[1] not that I think there is any great difficulty in disentangling the elements which are the legal ingredients of nuisance or any great need of examining the numerous elaborate attempts at defining and distinguishing the principles which are to be found in the judgments of many very eminent English Judges It is true that a legal nuisance is rather an evasive shifting and intangible thing, hard to be pinned down by a verbal definition It must always be conditioned by time and place and circumstances, and it is little better than a truism to say, as Lord Thesiger said in the case of *Sturges* v *Bridgman*,[2] that 'what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey " It is still more difficult in a city like Bombay, where the modes of life the habits and the whole sanitary apparatus of about eighty per cent of the vast population, would hardly be accessible to what is ordinarily meant by nuisance in the English law at all, to put anything like precise and legal limits to the notion of nuisance Doubtless what would be a very real nuisance in a select and refined residential quarter would not be a nuisance in a slum and what possibly ten per cent of the population of Bombay might genuinely feel to be a nuisance would never occur to the minds of ninety per cent of the population to be a nuisance at all There is probably hardly any part of this city, except specially select residential quarters outside what may be called the native limits, where the bulk of the inhabitants are

(1) (1851) 4 De G & Sm 315 at p 322. (2) (1879) 11 Ch D 852

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not daily and hourly exposed to malignant odours and incessant noises. Considerations of this kind make a decision of such a case, as I have before me one of much difficulty. It is also one of considerable importance, I think, to the public. It might, on a first view, be thought to involve something more than what is in issue definitely here between the parties, namely, the much wider question how far the comfort of the individual must be subordinated in certain circumstances and certain conditions to the convenience of the general public. Such a consideration does not really arise in a Court of law. That was very emphatically laid down in the case of *The Attorney-General* v. *The Town Council of the Borough of Birmingham*.[1] It would naturally be contended on behalf of the defendant in a case of this kind that we must have public stables in the city of Bombay, if the public are to have the convenience of the use of hack carriages, and it will surely be asked, where are these stables to be put and how can they be maintained at all, if any discontented and hypersensitive resident in the neighbourhood can come into Court, and, after establishing one or two facts showing that the average comfort of the citizens of his class has been slightly invaded, obtain an injunction which would result in closing the stables. The answer to all this which at first sounds very plausible, is simply that should there be any such pressing and urgent need, that is the business of the Legislature and not of the Courts. The Legislature can provide for what is necessary in the interests of the public generally by Statutes and the Courts must obey and enforce such Statutes. But in their absence no general considerations of mere policy or rather abstract public rights can be allowed to prevail against what the law recognises, and always has recognised, as

(1) (1858) 6 W. R. 811.

the legal rights of the individual Keeping this principle clearly in view will assist us not only to narrow down the case with which I have to deal but to understand better the limitations thus imposed upon persons situated, as the defendant is situated, in regard to the rights of others in their immediate vicinity For, I trust that I have now made it clear that the only question I have to answer is really an extremely simple question of fact namely, whether the stables built and maintained by the defendant do constitute a nuisance of such a real character as would entitle the plaintiffs to relief in law against it In answering that question I shall certainly not omit any of the considerations I have indicated in the foregoing observations I shall have due regard to the station in life of the plaintiff, Dorabji Framji Kumana, and his family, to the locality of the stables and the nature of the nuisance complained of I shall also have to consider whether in view of the indubitable fact that the greater part of what I may call the native city of Bombay is pervaded and permeated in all directions by smells and noises, the nuisance caused to the plaintiff, as he alleges by these stables, is more than a fanciful nuisance It will have to be measured by standards suitable to the circumstances and conditions I have stated and not confined to elegant refined and dainty modes of life

I may at once brush away about sixty per cent of the evidence in the case as being utterly useless That is almost invariably the result of these strenuously contested suits I could wish that it had been possible to confine the trial within a narrower compass But in dealing with an alleged nuisance, it is very difficult at an early stage of the case, indeed at any stage until it is nearing completion, to say what effect evidence which is about to be offered may or may not have upon some one or other ingredient of the total notion of

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nuisance, but it is quite certain that the defence has rather misconceived one aspect of nuisance Virtually the whole expert evidence of the Municipal Health Officers, brought here in support of the defendant's case, goes no further than saying that the stables, kept as they are kept, do not constitute any danger to the life or health of the plaintiffs and their family Now, in all nuisances there must be many degrees There may be nuisances which endanger life, there may be others which endanger health, and there may be, again, nuisances which do no more than diminish the comforts of the plaintiffs But the last class, no less than the first two, are undoubtedly nuisances, and there is no distinction whatever in principle between them that I can see beyond this, that I apprehend that where the nuisance was of a kind to injure the health or seriously imperil the life of those complaining of it, the Court would not hesitate to prevent it by an injunction, but where the nuisance was of the third kind, going no further than diminishing the comforts of human life, there would always be a question whether the Court would proceed against him who causes that nuisance by injunction or compensate the sufferer in damages Before attempting to appreciate the evidence, very briefly, for what it is worth, let me say that almost the whole of it becomes superfluous when we consider the admitted facts I cannot myself conceive how a large stable of this kind, standing within twenty or thirty feet of a gentleman's dwelling-house, could possibly be anything less than a nuisance How much of a nuisance it might be would depend entirely upon the sensibilities of those occupying the adjacent dwelling-house But that it must be a nuisance to some extent appears to me *prima facie* almost certain I do not see how seventy-five horses stabled on 550 square yards of land within thirty feet of a decent dwelling house could be other than a very serious annoyance to

the inmates of the house if they were at all sensitive either to sound or smell And as soon as the question is removed from the sphere of danger to life or injury to health, and kept within the limits of the third and lowest class of nuisance it appears in the first instance almost to answer itself I entertain no doubt whatever, but that the plaintiff Dorabji Framji Kumana and his witnesses, particularly the expert witnesses, have done their very best to exaggerate the case against the defendant, but, then, one expects little else from expert witnesses I do not mean to say that in this case they are particularly bright examples of the lengths to which that kind of evidence is sometimes carried Indeed, I think that, on the whole, the plaintiff's expert witnesses were moderate and cautious, and this was particularly the case with Major Glen Liston The result is that a careful analysis of their evidence shows that they have really confined themselves, for the most part, to medical generalisations, the truth of which nobody is ever likely to question Col Jackson entertains very Utopian ideas, and Bombay is far indeed from being Utopia Major Hutchinson also evidently entertains strong antipathies to stables in crowded localities Unfortunately in this city stables could hardly be put anywhere except in crowded localities, or at such a distance from the places where the horses need to be used that they would become utterly useless For, it may safely be said that the less crowded parts of the city within a reasonable distance of the areas over which hack carriages ply are occupied by a relatively few superior and refined classes, and they would be the very first to protest against the nuisance of large public stables being set up close to their residences And if the stables are to be confined, as it then appears almost inevitable they should be, to the lowest slums where, although the surrounding population would not be the least likely to complain of nuisance I should think the

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consequences would be far more disastrous to public health generally than if the stables were allowed to exist in quarters where they are likely to be more zealously watched and supervised These are, again, general considerations, considerations of policy rather than of law The evidence of the experts for the plaintiffs, Major Hutchinson, Major Glen Liston, Col Jackson and Dr Desai, if the latter be called an expert, proves, I think, that a certain amount of unpleasant smell was perceived by more than one of these gentlemen within the plaintiffs' house and dwelling apartments and that is about all The rest of the medical evidence, excluding, for a moment, Dr Desai, will be seen on examination to be almost always entirely inferential Where there are horses, there is likely to be horse-dung where there is horse dung, there are likely to be flies and possibly mosquitos Flies are dangerous carriers of disease Therefore, there is enhanced danger to the inmates of the adjacent houses All that may, or may not, be true, but it is rather evidence by conjecture or evidence on general principles, than evidence on actual facts I am not neglecting those statements in the depositions of these medical gentlemen where we find them saying that they actually noticed a large number of flies, larger number than they expected at that time of the year in the rooms of the plaintiffs' dwelling-house Their evidence as to the condition of the stables appears to me to be of little or no value, because I cannot doubt that taking the evidence as a whole the conclusion must be as stated by more than one witness that as stables go in Bombay, these stables are extremely well kept and may indeed be said to be, as I think Dr Turner said they were, the very best public stables at present to be found in the whole city The laudable efforts of the plaintiffs' experts to discover the minutest flaws in the defendant's stables may be attributed to that peculiar attitude of mind

which has placed expert evidence in the opinion of many eminent Judges in a class by itself It will be observed that Col Jackson declares that he saw one rat-hole, and the plaintiff has attempted to make a very great grievance of the danger to his health and life caused by an invasion of rats from the stable granaries I refer to this to show what every Judge knows very well is the nature and value of expert evidence It is on another ground, however that these experts are perhaps equally emphatic against the stables They are all agreed that want of sleep at night lowers vitality and predisposes one to every form of disease Now not one of them is in a position to say at first hand whether the dwellers in the plaintiffs house have been really deprived of their sleep at night by stable noises Here, again, we may cordially agree with these medical expert gentlemen Doubtless, if you deprive human beings, for a considerable time, of sleep, they will suffer in health but that will go but a little way to help in answering the question whether this group of human beings has been deprived of sleep by the noise occasioned in or around the defendant's stables And here again, I must touch upon one argument used by the defendant, namely, that even assuming the hack victoria drivers do make considerable noise in bringing their carriages in at all hours of the night that is no fault of his and he cannot be charged with nuisance on account of it He says that he is only answerable for keeping up his stables and keeping them up in the best sanitary state possible and that he cannot be called upon to account for noises made by those who frequent his stables as they come and go Up to a certain point I do not doubt that there might be some force in that argument but it has to be examined specially with reference to the question whether or not the noises complained of are necessarily incidental to the up-keep

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of the stables If they had occurred a hundred yards from the stables, then it might fairly be contended that the owner of the stables was not answerable for them Still less can he be held answerable for the noises in the adjacent chawls and liquor shops, as deposed to by the plaintiff and his witnesses, made by the syces and drivers of these carriages I do not know that it is a nuisance to set up the stables merely because the class of people attracted by the stables may cause noise and brawls in their vicinity I do not say that it might not be so That will be a very nice and delicate question to answer But I entertain no doubt at all that if some of the noises complained of are necessarily incidental to the existence of the stables, then the stable keeper must answer for them as for any other nuisance originating in his stables For it would seem to me to be as absurd to contend that he was not, as to say that those who built a railway station are not answerable for the noise the trains make as they come in and go out

I thus find that there are two main grounds of complaint revealed in the expert evidence for the plaintiffs first the odours emanating from the stables, and next the noises made in the stables which deprive the plaintiffs their family and tenants, of their natural sleep And the question is, how far these grounds are made good Either of them alone would doubtless constitute a nuisance Both together might constitute a very serious nuisance

Now, if we turn to the non-expert evidence on behalf of the plaintiffs, and I would include in that the evidence of the family physician, Dr Desai, we have a very overcoloured picture of the extreme sufferings and hardships to which the dwellers of the plaintiffs house have been exposed The case of Mr Katrak is typical It also has another important bearing upon the question

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I am trying, because Mr Katrak contends that he was driven away from the plaintiffs' house by the propinquity of these stables and the plaintiffs on that account sustained all the loss in rent which they have suffered since Mr Katrak left I do not believe for a moment that the ailments of which Mr Katrak personally complains and which he describes as having frequently afflicted his rather numerous family can be attributed to the exhalations of the stables If we collate the medical evidence as a whole there can be no doubt but that the general opinion is decisively against the conclusion that any of the inmates of the plaintiffs' house, notwithstanding the account they gave of their own sufferings, could possibly have been injured in health by such odours as were wafted when the wind blew from the north-east into the plaintiffs house In the first place, there is no ground whatever I believe medically speaking, to the idea which was first started and busily disseminated by Dr Desai that the sore throats of Mr Katrak and the other witnesses of the plaintiffs, who complained of it were directly caused by the smells of horse dung or horse-urine I suppose there is no more common complaint in Bombay than sore throat, and if we must indulge in the very dangerous practice of ascribing causes, I think the general opinion would lean to the view that the too abundant dust with which this city is usually supplied is the cause if there be a single cause, of the prevalence of this, and cognate affections of the eyes Mr Katrak who appears to be an extremely delicate and highly strung not to say neurotic individual would probably suffer from some ailment or other whether he lived close by stables or whether he did not And because of that very nervous temperament of his it is quite likely that he suffered more than the rest of the tenants from the noises if noises there were made in the stables during the night But I cannot believe for one

moment that any of his family suffered from diarrhœa, or low fever, or sore throat, more than I believe that the plaintiff's wife suffered from giddiness, vomiting and the like, merely because of such odours as were generated in these stables We may, however, take it, on the medical evidence, I suppose, and on the testimony of these people, that a certain amount of horse effluvia did occasionally penetrate the plaintiff's premises I am the more ready to believe that, because I do not see how it could possibly be otherwise The question would then have to be answered whether the occasional discomfort of being invaded by smells of this kind was such a diminution of the ordinary human comfort of men and women in the plaintiff's position of life in this city as would in law amount to nuisance Did the matter rest there, I should entertain considerable doubt whether they did As I say there are few parts of this city, even in the most fashionable localities, where residential quarters are not at times invaded by peculiarly penetrating and malignant smells We should all prefer to be without them, but provided they are not continuous and provided that every precaution is taken to diminish them, reasonable people, I suppose, have to put up with inconveniences which long experience shows are inseparable or were hitherto inseparable from life in close proximity to masses of Orientals I do not doubt that with growing civilisation and better living, the standards of comfort will be raised and by degrees even the lowest orders in the city of Bombay would become accustomed to more sanitary and more pleasing conditions of life than those in which they have passed their lives from their infancy and their fore-fathers for thousands of years before them But we are here dealing with a Parsi gentleman and his family, and another Parsi gentleman who tenanted his flat thus representing a class of tenants whom the proprietor might reasonably hope to

retain, should there be no invasion in the shape of a nuisance of those amenities and comforts which existed when he built his house Mr Katrak was a mathematical teacher and is now head accountant in the Accountant General's Office He paid a rent of Rs 80 a month, that is to say, roughly some £70 a year, and tenants paying £70 a year in London are of a very respectable class entitled to all reasonable comforts and amenities as much as the best in the land The plaintiff, again and his wife and family are well-to do Parsis of what I might without offence call the upper middle class and having regard to the style of the building and the rents the plaintiffs expected to obtain from their upper flats, I should say that the ordinary comforts and decencies of human life to which they are entitled would certainly involve their protection against being exposed night and day to the odours of horse urine and dung, and worse still having their night's rest disturbed and broken by the stamping of horses and bringing in of carriages with all the noises which invariably attend in this country the taking out and grooming of horses Now the noises at night are attributed principally to these hack carriages coming in and the horses being then unharnessed and taken to the stables and there groomed Everyone in this country knows that the grooming of a horse at the hands of an Indian syce is by no means a silent affair and in addition to that there is evidence that the horses stamp a good deal at night and that there is much loud shouting among the syces as the hack gharries come in at the close of their daily labours This I think, must be the case here, and I see no reason to doubt the evidence of the principal witnesses for the plaintiff that is to say, the plaintiff himself his wife and Mr Katrak, on this point I confess to some doubt whether the other tenants of the ground floor, Simoens, Rosario Alfonso and D Abreo are entitled to much weight

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They belong to a very different class There can be doubt that Simoens did give notice to quit on ground that proximity to the stables was an intolera nuisance Whether that was due to the nuisance, whether he meant to quit in any case, as the defend asserts, and in order to oblige his landlord, gave a reason the nuisance caused by the stables are questic which I should feel some difficulty in answering w positive confidence Certain it is that he left on t notice, and presently his salary was raised and he now occupying quarters for which he pays more th double the rent he was paying for the room on t ground floor of the plaintiffs house It is true that l new quarters are in a locality bearing the somewh forbidding name of Dukerwadi (pig-sty), but he declai they are clean and quiet I think that there is conside able probability in the suggestion of the defendant th in contemplation of this rise in salary, he meant to tak better quarters and the occasion was availed of by th plaintiff to induce Simoens to assist him in makin evidence for this case I do not believe a word of th evidence of Rosario Alfonso, if he means to say that h would suffer anything either in health or nerves, c that his sensibilities have been offended by anythin that was being done in the stables The case of D Abre is quite different He appears to be extremely delicat and overstrung Major Gordon Tucker, who saw him says that he gave him the impression of being in th early stages of pthisis Now if that were so, his phy sical condition alone might well account for his no sleeping at night He has continued living there still He is certainly a very remarkable man if his story be true that for about two years he has never been able to sleep for more than two or three hours a night What has actually happened is that the plaintiff has given him a better room at the same rent, and notwithstand ing the terrible sufferings he must have endured during

all those long, long months, he still lives in the house irrespective of the smells and sounds of the stables, that is to say, in spite of his former agonising sufferings he continues to live there for the consideration of rupee one a month deducted from the full rent of the room he is now allowed to occupy I mention all these details to show how deliberately the plaintiff and his witnesses have exaggerated, wherever they dared, the case against the defendant The plaintiff himself appears to be an extremely robust and virile old gentleman, who does not exhibit any signs of impaired vitality caused by the noises and smells emanating from the defendant's stables, and I should not imagine from his healthy appearance that he has suffered much in any other respect than, possibly temper His wife, again, although she complains of a series of ills which ought to be enough to shatter an iron constitution, appeared to me to be in the enjoyment of very excellent health She alone tells us of a plague of rats from which the house is suffering since the stables have been built She declares that she saw nine in one day though she cannot say whether she saw nine different rats or one rat nine times and as far as I remember she is the only witness who has seen a rat, although the danger from rats is put in the fore front in the medical reports One rat hole has been seen by Col Jackson, although he admits that he is not prepared to swear that it was a rat-hole and still it was a hole and a hole might accommodate a rat That is undeniable As to flies and mosquitos, the evidence, where it is intended to be direct, appears to me to break down entirely Unfortunately, the defendant's evidence consisting, on the whole of very good material, indeed, was necessarily of a negative kind But neither Dr Turner, nor Dr Goldsmith, nor Dr Darabsett, nor Dr Ibrahim Abdul Hussein, nor Dr Gordon Tucker, noticed any unusual number of flies or mosquitos on their visits to the

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stables and the plaintiffs' house None of these witnesses detected any smell in the plaintiffs' house and they all agree that the stables were admirably kept They all agree that they conform to the highest standard of construction yet enforced by the Municipal authorities Indeed they have been made to conform by anticipation to certain Bye-laws which are shortly expected to be passed There is, therefore, no fault attributable to the defendant either in respect of construction or maintenance of his stables Unfortunately that is no defence in an action for nuisance If the nuisance exists, it is no answer to say that the defendant has done everything in his power and taken all reasonable precautions to prevent its existence I have not dwelt particularly upon the evidence of Dr Desai which was extremely long and in parts of a very peculiar and striking character He is a family physician to the plaintiff and Mr Katrak, and he has managed to persuade himself, I do not doubt quite honestly, that all the ailments, and they seem to be of varied kinds, afflicting this group of persons, are all attributable to the proximity of stables From what we have seen of the samples, with the exception of Mr Katrak, of the residents of the plaintiffs house I can only say that they appear to have been wonderfully well able to withstand what, according to him, was the continuous operation of dangerous causes I give him credit for the best of intentions , but I confess there are parts of his evidence which make me doubt his intelligence On the other hand, it is quite impossible for the unfortunate defendant to bring in any evidence at all except of a kind which is not likely to carry very much weight The point being whether certain facts exist at certain times and in certain places, the evidence of gentlemen of the most unimpeachable character that they did not observe those facts because they did not happen to be there at those times is obviously a little

wanting in conclusiveness But of all the te[illegible] the case, that which was given in the clear[illegible] convincing manner was, in my opinion that of [illegible] Gordon Tucker But he is only speaking infer[illegible] and as a result of a very brief inspection [illegible] declares that in his opinion, the stables could [illegible] possibly be a nuisance to those dwelling in [illegible] plaintiffs house I do not myself believe th[illegible] smells have created any very real, much less [illegible] nuisance I am not at all sure about the nois[illegible] night and as to this none of the witnesses for th[illegible] defence can say a word I do not even exc[illegible] Dr Naiman who was an extremely enthusiastic expert witness on behalf of the defendant On the [illegible] to attend a sick patient in the small hours of th[illegible] morning, he appears to have dropped in *en passant* [illegible] the stables and he says that he did not hear then any particular noise He has to admit that he was not there for more than fifteen minutes Unfortunately that proves little In all other respects he is in the same position as his confreres He is perhaps singular in being an enthusiastic advocate of stables in the immediate vicinity of residential quarters He lives near stables himself, and he appears to entertain an opinion that if stables are reasonably well kept they are rather a sanitary than an insanitary influence

I think, after giving my best attention to the whole matter that the existence of these stables although they have been constructed according to the very latest requirements of the Municipality and have been maintained with the utmost care and under the most diligent supervision and in the best possible condition and have in every respect satisfied all the Municipal Sanitary authorities and have obtained a license from the Municipal Commissioner himself, they being where they are, do inevitably and are proved in this case to

constitute a nuisance against which the plaintiff is entitled to obtain relief

The question, then, arises, whether he should be granted an injunction or whether it will be sufficient to compensate him in damages The English Courts never appear to find any difficulty in combining these two forms of relief, and that was the course adopted by Sir Charles Sargent in the case of *The Land Mortgage Bank of India* v *Ahmedbhoy Habibbhoy* [1] In cases of the kind I am dealing with there are additional reasons for adopting that course, for here the plaintiffs are complaining of actual damage by loss of rent and loss of comfort and can put no limit to the damage they anticipate in future, should the nuisance be allowed to continue It must be admitted that on the first view there seems to be something a little inconsistent, having regard to the terms of the Indian Specific Relief Act in combining an award of damages with an injunction But I shall not hesitate to follow Sir Charles Sargent after duly considering many English cases which appear to me to support that course Thus for instance, in the case of *Rapier* v *London Tramways Company* [2] the claim for relief was founded on various grounds and the chief nuisance was abated before the trial The Judge gave 40s in costs and added an injunction to protect the plaintiff against further injury in future, and that was upheld on appeal

I am therefore, now to consider as best I can upon the materials before me what, if any, damages the plaintiffs are entitled to here Their claim for damages is chiefly founded upon their loss of tenants actual and prospective It is admitted that the ground floor is still fully tenanted and that no loss has been suffered

(1) (1883) 8 Bom 35

(2) [1893] 2 Ch 588

on that account That is only natural having regard to the class of persons who occupy the plaintiffs' rooms on that floor There then remains the first floor, which was formerly occupied by Mr Katrak and has remained unoccupied since he left for a period of eight months before suit The plaintiffs also claim that but for the stable nuisance they would have let the first, second and third floors (including those which they themselves occupy) to the Head Club at a rent of Rs 275 a month As to that we have the evidence of Moraes and Coutinho, and the evidence shows that Moraes who appears to be the Director of this so called Club did contemplate taking the plaintiffs first second and third floors but after consulting the Club Doctor Dr Coutinho, the idea was abandoned Dr Coutinho has given evidence here I attach little or no importance to his opinion He is a man of relatively small professional attainment, limited practice and, I should say, limited intelligence But he has a very definite idea that stables in close proximity to residential quarters do not enhance their salubrity and amenities and to that extent I think, most people would agree with him The members of this club, however, I gather, are of a class who are not very sensitive either on the score of mere comfort or refinement, and but for their Doctor's solicitude on their behalf I should think there was no reason why Moraes should not have taken these premises if he intended apparently to crowd in some forty-five or more of his club mates on the first second and third floors of this building I cannot doubt that in fact the bargain went off because of the opinion whether well or ill founded expressed by Dr Coutinho But I must remark on this that it is in my opinion quite inconsistent with a part at least of the plaintiffs case as expressed in the very emphatic evidence of the plaintiff, Bai Bhicaji If that part of her evidence is read it will be seen that she expresses

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and doubtless with a very clear idea of its legal bearing on the question of damages, an almost romantic attachment to this particular building She was doubtless advised that that might have helped the plaintiffs' case in one or two points and increase the measure of damages But if she says that she would *rather die than give up residing in that house, I do not* quite understand why Moraes's proposals were ever entertained at all But I put all that down as being of a piece with the plaintiff's general scheme of over colouring and exaggerating in every point the discomfort, injury and damage which he has suffered On this ground, then, there is the fact, the undoubted fact, that Mr Katrak left the house and that his flat has remained vacant ever since I think that I must take it to be true, and he swears, that he left because he could not endure the proximity of the stables It has been suggested by the defendant, and not without force, that this is not the true reason but that he really left when the chawl was put up because in its present position its inmates are able to overlook his premises and so destroy his privacy That too is quite possible But assuming that he did leave, as he said he did, on account of the stable nuisance then doubtless the plaintiff would have suffered loss to that extent, since he has not been able, although he swears he has done his best to obtain another tenant I do not attach much importance to his loss of the Head Club as tenant at a rent of Rs 275 a month, because it is, as I just now said, entirely inconsistent with a great part of his own evidence namely, that he has always been particularly desirous of retaining the second and third floors of the house for the residence of himself and family But it appears to me that some consideration must be given to the defendant s offer which was made at the earliest stage and has since been adhered to of taking the entire building at Rs 315 a month for the remaining portion

of his lease, that is for the next sixteen years He has also made in Court an offer to take Mr Katrak's flat at the old rent for the same period Now, according to the estimate given by the plaintiff himself of the rental value of his house, it would not come to more than Rs 315 a month , but he says that he anticipated getting Rs 400 for it as time went on and that the offer of the Head Club showed that this anticipation would have been realized but for the existence of the stables and it is contended on his behalf that the defendant's offer is not to be taken into consideration in diminishing the plaintiffs' damages since it really amounts to compelling him by the existence of the nuisance to forego his preferences and deliver his property into the defendant's hands But again I say he cannot thus blow hot and cold If he wishes to estimate his damages for the loss of rent by the offer of the Head Club, he then cannot turn round and say that the defendant's offer should not be considered in this connection because it involves the withdrawal of the plaintiff and his family from the house It would have been equally necessary for the plaintiff and his family to vacate their floors if he had accepted Moraes's offer So that, on the whole, I do not think that there is any real reason why if they declined to accept the defendant's offer, they should now be heard to complain that they have been damnified in pocket by their dwelling-house or any part of it remaining tenantless

There remains the question whether the plaintiffs are entitled to any damages on account of the discomfort to which they have themselves been subjected as a consequence of the nuisance on account specially of having been obliged to leave their house and incur the expense of taking up quarters elsewhere I think in view of what I have already said, I must hold that they have been exposed to a considerable amount of

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discomfort and unpleasantness I doubt whether it was really necessary for them to leave their flats and take up new quarters as they say they have done elsewhere I attach no importance whatever to the fact that on the first occasion they left in the hot weather to reside in Bhicaiji's brother's house I expect that that was a family arrangement and had nothing more to do with the nuisance caused by the defendant's stables than perhaps indirectly with the intention of making evidence in this suit I am not, therefore, disposed to base the award of damages upon any definite sums which, they may allege, they paid in rent or otherwise As for the alleged discomfort and unpleasantness which they have suffered, that is again a matter which is extremely difficult to assess in terms of money But I think the justice of the case would be sufficiently met if I award the plaintiff Rs 500 in lump as damages, and further add an injunction in the ordinary form which appears to be invariably used in England, restraining the defendant from carrying on his stables in such a way as to occasion a nuisance to the plaintiff This too is to carry all the costs of the suit

The decree will be drawn accordingly

A reasonable time must be given to the defendant to comply with this injunction

Attorneys for the plaintiffs Messrs *Jehangir Seervai Minocher and Hiralal*

Attorneys for the defendant Messrs *Merwanji, Kola, Romer Billimoria and Co*

Suit decreed

G G N

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

DATTATRAYA SAKHARAM DEVLI (ORIGINAL PLAINTIFF) APPELLANT *v* GOVIND SAMBHAJI KULKARNI AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS *

1916
February 1

Hindu Law—Adoption—Divesting of estate on adoption—Property of the natural father vested exclusively in the son before adoption—After adoption the property remains in the natural family

Under Hindu Law when a boy is given in adoption he loses all the rights he may have acquired to the property of his natural father including the right to property which has become exclusively vested in him before the date of his adoption

Rajah Venkata Narasimha Appa Row v *Sri Rajah Rangayya Appa Row* (1) dissented from

SECOND appeal from the decision of V G Kaduskar Additional First Class Subordinate Judge, A P, at Ratnagiri, confirming the decree passed by K G Tilak Subordinate Judge at Devgad

Suit to recover possession of property

One Mahadev, who was separated in estate from his brother, Sambhaji, died leaving him surviving his wife Parvatibai, a son Ramchandra, and three daughters Sometime after, Ramchandra was given away by Parvatibai in adoption Parvatibai mortgaged Mahadev's estate with possession to Dattatraya (plaintiff) nearly twenty years after Mahadev s death

The plaintiff having sued to recover possession, it was contended by Sambhaji s sons (defendants Nos 1 and 2) that Parvatibai had no right to pass the mortgage deed The daughters of Parvatibai supported the mortgage

* Second Appeal No 899 of 1913

(1) (1905) 29 Mad 437

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The first Court held on the authority of the case in I L R 29 Mad 437, that Ramchandra was not, by his adoption, divested of the property already vested in him, and that, therefore, Parvatibai had no interest in the property The suit was accordingly dismissed

The lower appellate Court confirmed the decree on appeal

The plaintiff appealed to the High Court

A G Desai and *S Y Abhyankar*, for the appellant — On Ramchandra's adoption, all his rights to the property of his natural father which devolved on him came to an end The verse in Adhyaya IX, verse 142, of Manu clearly shows that the adopted boy loses the *gotra* and the *riktha* of his natural father The verse must be construed according to the spirit of Hindu Law *vide* also the Dattaka Chandrika, Stokes Hindu Law, p 640 and the Dattaka Mimamsa, Stokes' Hindu Law, p 599 The construction placed on the verse in *Sri Rajah Venkata Narasimha Appa Row* v *Sri Rajah Rangayya Appa Row*,[1] is not proper There is nothing to show that the verse applies only to *claims* arising *after* adoption The decision in *Behari Lal Laha* v *Kailas Chunder Laha*[2] is a decision under the Daya bhaga and cannot be applied to the present case The other texts of Hindu Law, cited above, do not lead to the conclusion arrived at by the learned Judges who decided it A reference may be made to the case of *Bir bhadra Rath* v *Kalpataru Panda*,[3] and it will be seen that the decision supports my contention

The proper view of law will be that adoption operates as the civil death of the person adopted in his natural family and as a re-birth in his adoptive family

[1] (1905) 29 Mad 437 [2] (1896) 1 C W N 121

[3] (1905) 1 C L J 388

The interest acquired by the person adopted accrues to him in the character of a member of the family and when that character is lost by adoption, the interest also ceases *vide* Sarkar's Hindu Law, pp 119, 120, 2nd Edition

P B Shingne for the respondent —Adoption does not sever the tie of blood in the natural family for all purposes He has to observe mourning for the loss of his natural parents He has to observe some restrictions as to marriage with a girl from his natural family It is also clear from the passage in the Dattaka Chandrika, referred to on behalf of the appellant that the idea of re-birth in the new family is only partially given effect to, for it is expressly provided that the initiatory rites which the boy has undergone in his natural family are not to be cancelled and performed afresh in his adoptive family This shows that there is no idea of death or re birth There is only one continuous existence

The verses from Manu cited on behalf of the appellant should be confined to cases of *inheritance* and *claims* arising sometime after the adoption, but should not be applied to determine the effect of adoption on the property *already* inherited prior to adoption Having regard to the mode of living existing in ancient times there was no reason to provide for a case of the type now before the Court

There is nothing in the above texts of Hindu Law cited on behalf of the appellant or in any other text which necessarily carries with it the idea that the adopted son is divested of property which is his own at the date of adoption

Property vested cannot be divested by any act or incapacity which before succession would have formed a ground for exclusion from inheritance, e g a widow

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does not forfeit her estate inherited by her on her husband's death, in case she becomes unchaste *after* the vesting of the estate in her *Moniram Kolita* v *Keri Kolitani* (1)

SHAH, J —The facts, which have given rise to this second appeal, are briefly these One Mahadev and his brother, Sambhaji, were divided in interest Mahadev died more than twenty years ago, leaving a widow Parvatibai, a son Ramchandra, and daughters After Mahadev's death Ramchandra was given in adoption to a different family at Gwalior The properties in suit which were originally assigned to the share of Mahadev, and which were vested in Ramchandra alone after Mahadev's death, were mortgaged by Parvatibai in 1909 to one Dattatraya, long after Ramchandra's adoption Dattatraya filed the present suit in the Court of the Second Class Subordinate Judge at Devgad to enforce his mortgage, to recover possession and to obtain an injunction It was filed against Sambhaji's sons, who were defendants Nos 1 and 2, and Parvatibai represented by her heirs and daughters as defendant No 3 Defendants Nos 1 and 2 contested the plaintiff's claim, and urged among other things, that the property being vested in Ramchandra at the time of his adoption remained vested in him even after he was given in adoption, and that Parvatibai had no right to mortgage the property, as Ramchandra was alive

The trial Court as well as the lower appellate Court have allowed this contention with the result that the plaintiff's suit is dismissed with costs

Mr Desai for the appellant (plaintiff) has questioned the correctness of this view and has urged in support of the appeal that on Ramchandra's adoption, all his

(1) (1880) 5 Cal 776 at p 788

rights to the property of his natural father which devolved on him on his father's death, came to an end, that his connection with the family of his birth ceased, and that Parvatibai inherited the property as the next heir of Ramchandra or Mahadev, when Ramchandra was given away in adoption. The question of law that arises is whether or not according to Hindu Law a boy given in adoption loses after adoption all his rights which he may have acquired to the property of his natural father before the date of the adoption. The parties are governed by the Mitakshara, and it is conceded, indeed it seems to me to be indisputable, that if a boy is given in adoption during his father's life time, he would lose all the rights to the property of his natural father, even though he may have as under the Mitakshara law he would have, a vested interest in that property from the date of his birth. That is, in the present case if Ramchandra had been given in adoption during Mahadev's life time he would have lost all vested interest in the property in dispute and it would have devolved on Parvatibai on Mahadev's death. The point is therefore limited to a case, in which the property has become exclusively vested in the boy before the date of his adoption.

This is apparently a point of first impression so far as this Presidency is concerned, and apart from certain decisions of other High Courts to which I shall refer later the point does not appear to me to present any difficulty. The text of Manu (Adhyaya IX, verse 142) bearing on this point is clear. It is translated in Vol. XXV of the Sacred Books of the East at p. 355 as follows:—"An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)."

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There are two readings of this verse in the one which is adopted in the different modern editions of the Manusmriti (such as the Nirnaya-Sagar Press edition and the Manava-Dharma Sastra edited by Mr Mandlik) the words *haret* (हरेत्) and *kuachit* (क्वचित्) are used whereas in the other, which is adopted by Vijnanes'wara and Nilkantha in quoting the verse in the Mitakshara and the Vyavahara Mayukha the words used instead are *bhajet* (भजेत्) and *sutah* (सुतः) respectively

In my opinion it makes no difference in the result whichever reading be adopted Mr Shingne has, however, relied upon the second reading as favouring his contention If it were necessary to make a choice between the two readings, I should certainly prefer the reading adopted in all the modern editions of the Manusmriti to that adopted by Vijnanes'wara and Nilkantha in quoting the verse

The meaning of the verse is clear The son given in adoption is not to take the *gotra* or the *riktha* of his natural father His dissociation from the family (*gotra*) as well as the estate is insisted upon in unequivocal terms There is no room for the distinction sought to be made by Mr Shingne that the prohibition against taking is confined to the inheritance after the adoption, and does not extend to what is already inherited before the adoption The text generally prohibits the taking by the adopted son and does not restrict the taking to that which would devolve on him after the adoption It lays down that the adopted son shall never take or claim the estate of his natural father The words are wide enough to include the estate vested in him at the time of adoption, provided it is the estate of his natural father In my opinion, the text should be so read as to give effect to the fundamental idea

underlying an adoption viz, that the boy given in adoption gives up the natural family and everything connected with the family and takes his place in the adoptive family, as if he had been born there, as far as possible

It was urged by Mr Shingne that there was no provision in the text as to divesting an estate once vested in a person, and that the person leaving the family of his birth cannot be divested of property exclusively vested in him before adoption But this argument ignores the essential idea of an adoption There is a change in the position of the boy, and this divesting of the estate of the natural father is an incident, and, in my opinion, a necessary incident, of that change The boy given in adoption gives up the rights, which may be vested in him by birth, to the property of his natural father if the adoption takes place in his father's life-time To that extent the rights vested in him are divested after adoption If the divesting of a vested interest so far is to be allowed, I do not see any difficulty in holding that even if the estate of the natural father be wholly vested in the boy before adoption, he is divested of it when he is given in adoption It seems to me that there is nothing repugnant to Hindu Law in thus insisting upon what is a necessary incident of an adoption and in preventing an adopted son from taking away with him to his adoptive family the property which may have devolved upon him in the family of his birth The divesting of vested estates is by no means an uncommon [illegible] of adoptions under certain circumstances, and [illegible] me to be quite consistent with the Hindu Law

It has been urged by Mr Shingne that if t[illegible] boy can take his self acquired property [illegible] is under no obligation to leave it in the f[illegible] birth there is no reason why he should [illegible]

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differently with reference to the property, which has vested in him exclusively on the death of his father before the adoption But this argument ignores the difference between his self acquired property and the estate which has become vested in him exclusively on his father's death In one case the property is his own, and in the other it is the property of his natural father The text of Manu refers to the estate of the natural father and the mere fact that he is dead at the time of adoption and that it has become the property of his son at the time does not change the character of the property for the purposes of the rule laid down by the text, and it cannot be treated as his self acquired property

This conclusion is in consonance with the Mitakshara and the Vyavahara Mayukha, wherein the text of Manu is referred to with approval see Mitakshara, Ch I Section XI, para 32 in Stokes' Hindu Law Books at pp 422-423, and Mandlik's Hindu Law, p 59 I quite recognise, as pointed out by Mr Shingne, that in neither of these works is the case, such as we have here, specifically provided for But neither the Smriti writers nor the commentators contemplated the case of an only son being given in adoption after his father's death, and naturally did not advert to such a case But a general rule is laid down which is comprehensive enough to include the present case

I do not desire to place any great reliance upon the Dattaka Mimansa and the Dattaka Chandrika, but my conclusion is consistent with the view taken of Manu's verse in both these works see Stokes Hindu Law Books at pp 599 and 640

It is necessary to note briefly the decisions, in which a contrary view is taken, and which have enabled Mr Shingne to raise the various contentions already dealt with The case of *Behari Lal Laha* v *Kailas*

Chunder Laha[1] is a decision under the Dayabhaga Law, and the text of Manu has not been referred to in the judgment Besides a different view is taken by at least one of the learned Judges who decided the case of *Brbhadra Rath* v *Kalpataru Panda*[2] I am unable therefore to accept this decision as a guide in deciding the present case under the Mitakshara I desire to point out with reference to the passage quoted by Ameer Ali J in *Behari Lal's case*[1] from the well known case of *Mussumat Bhoobun Moyee Debia* v *Ram Kishore Acharj Chowdhry*[3] that it has no bearing on the present question Their Lordships of the Privy Council point out that by the mere gift of a power of adoption to a widow the estate of the heir of a deceased son vested in possession cannot be defeated and divested But here we are concerned with the effect of adoption on the property vested in the boy given in adoption at the time and which originally formed part of the estate of his natural father With reference to it we have a text of Manu which has been referred to in the Mitakshara and the Vyavahara Mayukha and which has to be construed and an intelligible principle underlying it, which has to be considered and applied I feel quite clear that the observations in *Bhoobum Moyee's case*[3] do not touch the present point

The decision of the Madras High Court in *Sri Rajah Venkata Narasimha Appa Rou* v *Sri Rajah Rangayya Appa Rou*[4] is directly in point and undoubtedly conflicts with the view I take of the Hindu Law on this point I have already stated some of the reasons for not adopting the view, which has found favour with the Madras High Court in dealing with Mr Shingne's contentions I need hardly add that I have considered the judgment with care and respect to which it is

(1) (1896) 1 C W N 121
(2) (1905) 1 C L J 358 at p 400
(3) (1865) 10 Moo I A 279
(4) (1905) 29 Mad 437 at p 4[illegible]

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DATTATRAYA SAKHARAM v GOVIND SAMBHAJI

undoubtedly entitled But unfortunately I am unable to agree with it, and it is plainly my duty to give effect to my view, as the decision is not binding upon this Court It is clear from the judgment that the learned Judges were influenced by the decision in *Behari Lal Laha's case*[1] and that they did not consider the texts to be explicit enough to require them to dissent from that view As regards the observations of the Privy Council quoted and relied upon at p 450 of the report, I do not think that they bear upon the present point The general rule stated by their Lordships of the Privy Council must be taken with reference to the point, which had to be considered and decided in the case see *Monnram Kolita* v *Keri Kolitani*[2] Its application in the Madras case seems to me to be far-fetched Here we have to consider the case of an adoption, and a particular text bearing upon the point arising in the case

On all these grounds it seems to me that the lower Courts are wrong in holding that the property in suit is still vested in Ramchandra On his adoption, the property went to the next heir in the family of his birth and therefore Parvatibai was competent to mortgage it In this case it is not necessary to consider whether on Ramchandra's adoption the property would go to his heirs or to his father's heirs, as in any view of the matter Parvatibai would be the next heir

It is satisfactory to find that this decision avoids the obvious anomaly of allowing defendants Nos 1 and 2, who belong to the natural family of Ramchandra, and who are more distant relations than Parvatibai, to hold the property to the exclusion of the next heir (Parvatibai) on the footing that the property still belongs to Ramchandra, who has left their family

(1) (1896) 1 C W N 121

(2) (1880) 5 Cal 776 at p 788 L R 7 I A 115 at p 153

he result, therefore is that the decree of the lower pellate Court is set aside and the suit remanded to trial Court for disposal on the merits All costs to date to be costs in the suit

BATCHELOR J —I am of the same opinion

With great respect to the learned Judges who decided e case of *Sri Rajah Venkata Narasimha Appa Row Sri Rajah Rangayya Appa Row*[1] I am unable to ubt that the texts are in favour of the appellant's ntention, and on the question of principle, apart om the texts I see no difficulty in holding that operty which vested in A as being the son of B comes divested when A ceases to bear that character

Decree set aside,

R R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Heaton

1916 February 14

UJI JAGANNATH (ORIGINAL DEFENDANT) APPELLANT v. GOVIND LAL KASANDAS SHAH (ORIGINAL PLAINTIFF) RESPONDENT *

Civil Procedure Code (Act V of 1908) section 92—Suit by a trustee against co trustee—Administration suit—Will—Charitable or religious trusts—risdiction—Practice

The plaintiff as one of the two surviving executors of the will of one arpandas Purshottam dated the 15th June 1892 sued the defendant ecutor in the First Class Subordinate Judge s Court at Ahmedabad—(a) for counts of the property of the deceased from 1899 and onwards (b) for an junction restraining the defendant from further management of the estate thout plaintiff s consent and (c) for an injunction restraining the defend t from interfering with the plaintiff s management of the said estate The

[1] (1905) 29 Mad 437

* Appeal No 47 of 1915 from Order

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will showed that the property was worth Rs 89 500 out of which Rs 19 500 were set apart for legacies and the balance of Rs. 70 000 was bequeathed to purely charitable and religious purposes The Subordinate Judge held that he had no jurisdiction to entertain the suit as it fell within the purview of section 92 of the Civil Procedure Code 1908 The Joint Judge in appeal was of opinion that the suit as framed by the plaintiff was to obtain the assistance of the Court for the purpose of securing co operation with the defendant in the due administration of the estate according to the provisions and directions in the will and in so far as it sought this relief it did not come under section 92 of the Civil Procedure Code 1908 He therefore reversed the decree and remanded the case The defendant having appealed

Held affirming the order of remand made by the Joint Judge that the Subordinate Judge had jurisdiction to entertain the suit for there was nothing in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts and the plaint contained no prayer for relief of any of the kinds specified in section 92 of the Civil Procedure Code 1908

PER CURIAM —If any questions relating to charitable bequests should arise in the present case before the Subordinate Judge his proper course would be to give notice to the Advocate General in order that that officer might decide whether any action should be taken under section 92 of the Civil Procedure Code in order to get any of the specific reliefs referred to in that section It would be quite possible for the Subordinate Judge to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed and holding those funds in the possession of a Receiver until the Advocate General or the Collector had obtained the directions of the Court if such were necessary with reference to the disposal of those funds under some suitable scheme Such directions of course would have to be taken from the District Court under section 92

APPEAL against the order passed by C N Mehta Joint Judge, Ahmedabad, reversing the decree passed by Vajeram M Mehta, First Class Subordinate Judge at Ahmedabad

Suit for accounts and management of property

The property in suit belonged to one Harjivandas Purshottam of Dhandhuka in Ahmedabad District By his will dated the 15th June 1892, Harjivan appointed the plaintiff the defendant, and one Thakordas as

trustees. The will showed property worth about Rs. 89,500 out of which private legacies amounted to Rs. 19,500 and the rest Rs. 70,000 were devoted to purely charitable and religious purposes. Thakordas having pre-deceased Harjivan, the probate was obtained by the plaintiff and the defendant alone in the year 1895. Till 1899 they managed the property jointly, but thereafter the defendant alone took possession of the whole property and managed the same without consulting the plaintiff. The plaintiff, therefore, sued the defendant in the First Class Subordinate Judge's Court at Ahmedabad—(*a*) for accounts of the property of the deceased Harjivan from 1899 and onwards, (*b*) for an injunction restraining the defendant from further managing without the plaintiff's consent and (*c*) to restrain the defendant from interfering with the plaintiff's management of the estate.

On a preliminary issue, the Subordinate Judge held that he had no jurisdiction to entertain the suit.

The Joint Judge, in appeal, reversed the decree and remanded the case for trial on the merits observing as follows:—

A plain reading of section 92 shows that it contemplates the following two classes of cases *viz.* (1) when there is any alleged breach of any express or constructive trusts created for public purposes of a charitable or religious nature and (2) where the direction of the Court is deemed necessary for the administration of any such trusts. Now a perusal of the plaint will show that one of the plaintiff's grievances is that though he has been appointed a co-trustee by the founder of the trust by the will exhibit 58 and though the District Court Ahmedabad has given a probate of that will to both the parties in this suit still the defendant has been managing the property exclusively and that accordingly he wants the Court's assistance to be joined with the defendant in the due administration of the estate according to the provisions and directions in the will. The suit in so far as it seeks this relief does not in my opinion come within the purview of section 92 of the Civil Procedure Code, vide *Miya vali Ulla* v. *Sayad Bava Santi Miya* I. L. R. 22 Bom. 496 at pp. 498-9.

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G N Thakor, for the appellant —The will of the deceased read as a whole shows that the bequests are all for charities That was admitted by the plaintiff himself If so, the First Class Subordinate Judge had no jurisdiction to entertain the suit which was solely within the jurisdiction of a District Court under section 92 of the Civil Procedure Code By the will Rs 19,000 are given in private legacies and Rs 70,000 for public charities and there is no allegation that any private legacy remained unpaid The Court of first instance took the correct view and rightly applied the case of *Tricumdass Mulji v. Khimji Vullabhdass*[1] The present suit is nothing but a suit by a trustee of a public trust for account and removal of a co trustee and to enforce the trust The lower appellate Court makes out a new case for the plaintiff and is of opinion that the suit does not fall within the purview of section 92 of the Civil Procedure Code The wording of the plaint, however, brings the suit within that section The suit is bad if taken as brought by an executor One executor cannot sue another executor William's Law of Executors and Administrators, 10th Edition Vol I, page 726

T R Desai for the respondent after referring to *In re Lea*[2] for the English practice was stopped

SCOTT, C J —The plaintiff brought this suit as one of two surviving executors of the will of one Harjivandas Purshottam dated the 15th June 1892 The defendant executor is alleged to be an Audich *brahmin* of the age of 80 and is charged with having mis-applied the property of the testator, and prayer is that the defendant should be held responsible for all sums of money which would be found to have been given, or caused to be given, to friends and relations or proved to have

(1) (1892) 16 Bom 626 (2) (1887) 34 Ch D [illegible]

been mismanaged, after taking an account from the year 1899 and onwards, since when he has been in sole management of the property of the late Harjivandas, and for a permanent injunction restraining the defendant from managing without the consent of the plaintiff and restraining the defendant from preventing the plaintiff from managing The plaint is a document of some length, and contains no description of the trusts or directions contained in the will of the testator But the suit may be treated as a general administration suit brought by one trustee against another with whose conduct he is dissatisfied, and the stamping of the suit as a suit for an account at the value of Rs 150 does not prevent the Court from imposing an adequate Court-fee in the event of any decree being passed for the payment of money by the defendant

That however is not the question now before the Court it is whether the learned Judge in the District Court was wrong in remanding the case for trial after the suit had been rejected by the Subordinate Judge on the ground that it was a suit framed under section 92 of the Civil Procedure Code and as such could only lie in the District Court There is not a word in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts There is no prayer for relief of any of the kinds specified in that section, and upon the face of the plaint we see no reason for holding that the Subordinate Judge had not power to entertain the suit That learned Judge, however states in his judgment that from the will it appears that the property was worth about Rs 89,500, out of which private legacies amount to Rs 19 500 and the rest Rs 70,000 are to be used for purely charitable and religious purposes

The learned Joint Judge in appeal pointed out that it did not follow that because money was to be used for

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the benefit of charities, that therefore a scheme would be necessary in the case of those charities In England the difficulty arising from superior and inferior jurisdictions does not arise, and any question relating to charitable bequests could be disposed of in an administration suit by the addition of the Attorney General, who corresponds to the Advocate General in this country, as a party to the suit As an instance, we may refer to *In re Lea*,[1] which was a general suit for administration The report relates to a question arising with reference to a particular charitable bequest involving the question whether a scheme should be framed or whether money should be paid by the executors direct to the legatee named as the controller of the charity It appears to us that if any questions relating to charitable bequests should arise in the present case before the Subordinate Judge, his proper course would be to give notice to the Advocate General in order that that officer might decide whether any action should be taken under section 92 of the Civil Procedure Code in order to get any of the specific reliefs referred to in that section It would be quite possible for the Subordinate Judge to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding those funds in the possession of a Receiver until the Advocate General or the Collector had obtained the directions of the Court, if such were necessary with reference to the disposal of those funds under some suitable scheme Such directions of course would have to be taken from the District Court under section 92 But we know nothing at present of the position of the charities in question We do not know whether any schemes will be necessary, and it appears to us as it appeared to the

(1) (1887) 34 Ch. D 528

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Joint Judge that it will be altogether premature to say that this suit, as framed, cannot be disposed of by the Subordinate Judge

The only other question which has been referred to is whether the Joint Judge was wrong in not giving effect to what has been described as an application for a decree in terms of the compromise We have been referred to documents upon which the point is based and it appears that there was no application for a decree in terms of the compromise There was only a mention of a previous agreement, and it was requested that the Court would admit the papers on to the proceedings According to the judgment of the Joint Judge the only issue raised before him at the time of the appeal was whether the lower Court had erred in holding that the suit fell within the purview of section 92 of the Civil Procedure Code, and that the Court had no jurisdiction to entertain it Upon that issue we think that the Joint Judge was right in holding in the affirmative and in remanding the suit We affirm the order and dismiss the appeal Costs, costs in the cause

Order affirmed

J G R

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Heaton

1916
February 23

ABDULLABHAI LALLJEE AND ANOTHER (ORIGINAL PLAINTIFFS) *v* THE EXECUTIVE COMMITTEE ADEN °

Aden Settlement Regulation (VII of 1900) section 13†*—Municipal affairs at Aden—Executive Committee—Rating of property for purposes of taxation —Rating value fixed by the Resident at Aden in a rating appeal—Finality of the decision of the Resident as to value—Jurisdiction of Civil Courts to examine the value in a civil suit—Rule made under the Regulation to give finality to the Resident s decision in rating appeal is* ultra vires

The Aden Settlement Regulation (VII of 1900) provided for the establishment of an Executive Committee for the Municipal Government of Aden and its clause 13 authorised the Resident subject to the previous sanction of the Local Government to make rules to provide for " the assessment and collection of any toll cess tax or other impost imposed under the Regulation The rules so made provided *inter alia* for the preparation of an assessment list containing " the annual letting value or other valuation on which the property is assessed for complaints to the Executive Committee where any property was for the time being entered in the list or in which the entered rateable value had been increased and for appeals against any rateable value to the Judge of the Resident s Court Rule 12 provided that after appeals if any were decided and the results noted in the assessment list all rateable values so entered in the list were final The lower Courts held on a construction of the above rule that it *made the decision of the Judge of the Resident s Court* in a rating appeal conclusive and that the aggrieved party could not question it by a civil suit.

° Civil Reference No 9 of 1915

† The section so far as material runs as follows —

The Resident with the previous sanction of the Local Government shall as soon as may be after the commencement of this Regulation and from time *to time make rules to provide for all or any of the following matters* namely —

* * * * * *

(G) the assessment and collection of any toll cess tax or other impost imposed under this Regulation

* * * * * *

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Held that the rule 12 read as it had been by the lower Courts was *ultra vires* inasmuch as a distinct unequivocal enactment was required for the purpose of either adding to or taking away the jurisdiction of a Court

THIS was a reference made under section 8 of the Aden Courts Act (II of 1864) by Brigadier-General C H U Price, Political Resident at Aden

Suit for a declaration that a certain tax was illegally assessed, and to recover the amount of the tax levied

The facts were that the plaintiffs trading under the name and style of Abdullabhai and Jumabhai Lalljee at Aden took a lease for thirty of certain lands in the Shaikh Othman Division of the Aden District from the Secretary of State for India in Council, for construction of salt works The lease provided for the payment of Rs 7,000 every year by the plaintiffs to the Secretary of State by way of rent for the demised lands and it further provided for the payment by the plaintiffs of a royalty of eight annas per every ton of salt exported by them

The Political Resident of Aden, in exercise of the powers conferred upon him by the Aden Settlement Regulation (VII of 1900), published two notifications on the 26th March 1909, levying certain taxes and laying down rules for the assessment and collection thereof The taxes levied were, a Property tax to be assessed at 6 per cent on the rateable value of the property taxed and a general Sanitary tax to be assessed at 3 per cent on such rateable value The said taxes were to be levied at only half the aforementioned rates in the village of Shaikh Othman The second notification laid down rules governing assessment and collection of taxes The material of those rules ran as follows —

1 When a rate on buildings or lands or both is imposed the Executive Committee shall cause an assessment list of all buildings or lands or buildings

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and lands as the case may be in the Settlement District to be prepared containing —

(a) The name of district or division in which the property is situated

(b) The designation of the property either by name or by number, sufficient for indentification

(c) The names of the owner and occupier if known

(d) The annual letting value or other valuation on which the property is assessed and

(e) The amount of tax assessed thereon

3 On the requisition of the Executive Committee or of such person the owner or occupier of any such building or land shall within such reasonable period as shall be specified in the requisition be bound to furnish a true return to the best of his knowledge or belief and subscribed with his signature —

(a) As to the name and place of abode of the owner or occupier or of both

(b) As to the dimensions of such building or land and the annual letting value or other valuation thereof

4 When the assessment list has been completed the Executive Committee shall give public notice thereof and of the place where the list or a copy thereof may be inspected and every person claiming to be either owner or occupier of property included in the list and any agent of such person shall be at liberty to inspect the list and to make an extract therefrom without charge The Committee shall at the same time give public notice of a day not being less than fifteen days from the publication of such notice on or before which complaints against the amount of any rateable value entered in the assessment list will be received in their office

5 In every case in which any property has for the first time been entered in the assessment list or in which the entered rateable value of any property has been increased the Executive Committee shall as soon as conveniently may be give a special written notice to the owner or occupier of the said property specifying the nature of such entry and informing him that any complaint against the same will be received in their office at any time within fifteen days from the service of the special notice

6 Every complaint against the amount of any rateable value entered in the assessment list *must be made by written application* to the Executive Committee on or before the day or the latest day fixed in the public or a special notice aforesaid stating the grounds on which the value is disputed

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7 The Executive Committee shall cause all complaints so received to be registered in a book to be kept for this purpose and shall give notice in writing to each complainant of the day time and place when and where his complaint will be investigated

8 The Executive Committee shall appoint an officer or officers to investigate and dispose of the complaint in the presence of the complainant if he shall appear and if not in his absence Such officer or officers may for reasonable cause adjourn investigation from time to time

9 When the complaint is disposed of and the result noted in the register any amendment necessary in accordance with such result shall be made in the assessment list

10 When all such complaints if any have been disposed of and all amendments in accordance with such complaints have been made in the assessment list the said list shall be authenticated by the chairman of the Executive Committee who shall certify that except in the cases (if any) in which amendments have been made no valid objection has been made to the rateable value entered in the said list

11 Appeal against any rateable value shall be heard and determined by the Judge of the Court of the Resident but no such appeal shall be heard by the said Judge unless it is brought within fifteen days from the date on which a complaint previously made to the Executive Committee as aforesaid has been disposed of

12 After appeals if any as aforesaid are decided and the results noted in the assessment list all rateable values so entered in the list shall be final subject to such action as may be necessary under rules 17 and 18 following

17 (1) The Executive Committee may at any time alter the said list by inserting the name of any person whose name ought to have been inserted or by inserting any property which ought to have been inserted or by altering the valuation of or assessment on any property which has been erroneously valued or assessed through fraud accident or mistake after giving notice to any person interested in the alteration of a time not less than one month from the date of service of such notice at which the alteration is to be made

(2) Every objection made by any persons interested in any such alteration before the time fixed in the notice and in the manner provided by rules 6 and 7 shall be dealt with in all respects as if it were an application under the said rule

(3) Every alteration made under this rule shall subject to the result of an appeal under rule 11 have the same effect as if it had been made on the earliest

day in the current official year in which the circumstances justifying the alteration existed

18 *(1) It shall be not necessary to prepare a new assessment list every* year Subject to the condition that every part of the assessment list shall be completely revised not less than once in every four years the Executive Committee may adopt the valuation and assessment contained in the list for any year with such alteration as may be deemed necessary for the year immediately following

(2) But the provisions of rules 4 5 6 7 8 9 10 and 17 shall be applicable every year as if a new assessment list has been completed at the commencement of the official year

In 1909, the value of the plaintiffs' leasehold lands was assessed at Rs 7,000 for rating purposes and the taxes were levied at Rs 283-8-0 The same amount was levied in the year following

The construction of plaintiffs' salt-works was completed in 1911 and the plaintiffs began to manufacture salt In that year, the defendants, the Executive Committee of Aden, abandoned the old method of assessing the taxes, and fixed the assessment value at Rs 2,79[illegible] being half the value of the salt exported by the plaintiffs during the year less 10 per cent The taxes so levied came to Rs 125-12-0 The plaintiffs appealed against the taxation, but the Political Resident at Aden confirmed the same In the two following years that is, in 1912 and 1913, the plaintiffs were assessed at Rs 2 240-3-8 and Rs 4 497-4-9, respectively, on the same principle of valuation The plaintiffs appealed against both assessments to the Political Resident at Aden but were unsuccessful

Finally the plaintiffs filed a suit against the Executive Committee of Aden, for a declaration that the new method of assessment adopted by the defendants in assessing the taxes for the years 1911 1912 and 1913 was wrong, illegal and unauthorised and that the

correct method of assessing the taxes was to take the fixed rental of Rs 7,000 or at the most such sum and the royalty payable by the plaintiffs They also prayed to recover back the amount of Rs 6,012-8-9 the amount of the taxes recovered in excess

The defendants contended *inter alia* that the decision of the Political Resident in the rating appeals was final that the plaintiffs had no cause of action, and that the Court had no jurisdiction to entertain or try the suit

At the trial the Assistant Resident and Judge raised a preliminary issue as follows —

Whether this Court has jurisdiction to interfere with the assessment fixed by the defendants and confirmed by the appellate authority ?

The learned Judge decided the issue in the negative and dismissed the suit on the following grounds —

Defendants cite certain rulings which they interpret in their favour The most important of these is the High Court decision in *Motar v Borsad Town Municipality* (1910 I L R 24 Bom 607)

This decision is authoritative and conclusive The only question is how far its effects may be modified by the force of two arguments advanced by plaintiffs The first of these has reference to the words by law which I have emphasised in the last sentence of the above quotation The plaintiffs contend that the rules under which the assessment is made and which provide for appeals against over assessment were not passed by the Legislative Council and therefore have not for the purposes of the present case the force of *law* That the rules were made by the President who cannot have had the intention and certainly had not the power to prevent a civil Court from hearing a regular civil suit to recover a tax illegally levied

I am unable to accept this view As pointed out by defendants the Aden Settlement Regulation (VII of 1900) is a Legislative enactment of the Governor General of India in Council Section 13 of that Regulation lays down that the Resident with the previous sanction of the local Government shall make rules to provide for various matters including assessment of taxes &c The rules now in question were so made with the previous sanction of the Government of Bombay and duly published by Notification of that

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Government These rules have therefore full Legislative sanction and unquestionably constitute the law on the subject under consideration

Moreover the ruling in the *Borsad case* refers to the rule providing a remedy against over valuation I can imagine no reason for supposing that the rule referred to was made in such a manner as to give it the force of law to a greater extent than as I conceive obtains in respect of the Aden rules And it is an important point in favour of the defendants argument that the Aden rules require an appeal to be made to the Judge of the Court of the Resident distinctly a more authoritative tribunal than the General Committee of the Municipality

I therefore hold that the valuation of the property was made and confirmed by the authorities in whom the powers of so doing had been placed by law

There remains a further argument of the plaintiffs which has to be considered They maintain in effect that the ruling in the *Borsad case* does not apply to oust the jurisdiction of a civil Court in a case where the valuation of the property has been made in an unauthorised manner not in accordance with the rules laid down and this they contend is the fact in the present case They cite the cases of *K Raghunathdas* v *Ankleshvar Municipality* (1901 I L R 26 Bom. 294) and *Secretary of State for India* v *Major Hughes* (1913 I L R 38 Bom 293)

The first of these two cases differed from the *Borsad case* in that the complaint was of an illegal assessment rather than an over valuation it being alleged that the mode of estimating the assessment was illegal and not in accordance with the rules framed by the Municipality The High Court held that if the allegation had been established the case could have been distinguished from the *Borsad case* The same principle was laid down in *Secretary of State* v *Major Hughes* where it was held that the taxing authority had gone beyond the powers assigned to him by law and that *therefore* his action being illegal the case was one in which the jurisdiction of the civil Court was not ousted I am bound to take the same view and to hold that this Court has jurisdiction to interfere in the present case if and only if the mode of assessment adopted by the defendants can be shown to be illegal

I hold that the defendants have calculated the letting value of the property in order to arrive at its rateable value and in so doing have in no way exceeded the powers given to them under the rules

For the reasons which I have given I hold that the action of the defendants has been neither unauthorised nor illegal in any respect and therefore it is not within the jurisdiction of this Court to interfere with the assessment fixed by the defendants on plaintiffs property It is perhaps not altogether to be

regretted that in order to arrive at a decision upon the point of law it has been necessary to some extent to enter into the merits of the case The result in any case is that the previous decisions of the Court of the Resident in appeal are final that this Court has no right to interfere and the suit is therefore dismissed with all costs against the defendants

On appeal by the plaintiffs, the Political Resident of Aden came to the same conclusion and dismissed the appeal but submitted under section 8 of the Aden Courts Act (II of 1864), the following questions for determination by the High Court of Bombay —

1 Whether the lower Court did not act irregularly and illegally in declining to hear the case as a whole and raising the preliminary issue and deciding the same without taking any evidence as to the merits of the case ?

2 Whether the decision of the lower Court on the said issue was not erroneous ?

3 Whether the lower Court was not wrong in dismissing the plaintiffs suit ?

The reference was heard by Scott C J and Heaton J, on the 9th and the 16th of February 1916

Inverarity, *Setalvad* and *Mulla*, with *Ratanlal Ranchhoddas*, instructed by *Edgelow, Gulabchand Wadia & Co*, for the plaintiffs

Jardine (Advocate General) and *Strangman*, instructed by *Nicholson* (Government Solicitor) for the defendants

Inverarity —The provisions of Rule 12 making the decision of the Political Resident at Aden in a rating appeal final,' do not make it final in the sense of ousting the jurisdiction of the Court for, any expression making the decision of any authority final, in fiscal Statutes cannot oust the jurisdiction of the Court if it can be shown that the assessing authorities have not proceeded in accordance with the provisions of the fiscal Statutes see *Armytage v Wilkinson*[1] and

[1] (1878) 3 App Cas 355 at p 369

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1900) had published two Notifications dated 26th March 1909 levying certain taxes and laying down rules for the assessment and collection thereof. Included among the taxes so levied were a House and Property tax and a General Sanitary Tax both taxes to be assessed on the *rateable value* of the property taxed

By these Notifications the defendants were charged with the duty of assessing and collecting the said taxes in accordance with the Rules therein embodied

The defendants acting on the powers thus conferred on them fixed the rateable value of the aforesaid leasehold lands of the plaintiffs at Rs 7 000 that being the amount payable by the plaintiffs as annual rent for the lands This was done in the year 1909 when the Salt Works had only just begun to be constructed and no salt had as yet been produced In the year 1911 when production had commenced the defendants adopted a new mode of assessment and fixed the rateable value of the property at one half the value of the salt exported by plaintiffs during the year less ten per cent

The plaintiffs state that they protested against this new mode of assessment but their protest was over ruled by defendants who continued in the following years to assess the taxes on the new basis in spite of protests from plaintiffs on each occasion The plaintiffs urge that this new method of assessment is wrong in principle and oppressive as well as being illegal and unauthorised and they ask for a declaration of the Court to that effect They ask further for a declaration that the correct method of assessing the taxes is to make the fixed rental of Rs 7 000 or at most such sum plus the royalty payable by plaintiffs on salt exported as the rateable value of the lands and to assess the taxes on such rateable value They ask finally for a decree for the refund of the excess sum over the amount legally payable recovered by defendants during the three years 1911 1914

Now the first point to be noted is that in their plaint *the plaintiffs make* no mention whatever of the fact that in three successive years they mad three appeals to the Court of the Resident in the manner provided in the Rules against the defendants decisions of which they complain and that all these appeals were rejected by the Court This is a fact to which great importance is not unnaturally attached by the defendants who maintain that these decisions in appeal are final and that this Court cannot interfere In the circumstances it has been necessary to frame a preliminary issue —Whether this Court has jurisdiction to interfere with the assessment fixed by the defendants and confirmed by the Appellate Authority ? If the decision on this issue be found in the negative this Court can have no option but to dismiss the suit

The plaintiffs *inter alia* contended that the rules providing for appeals against over-assessment were not passed by the *Legislative Council* and therefore, have not for the purposes of the present case the force of law

The Aden Settlement Regulation, 1900, made under the Government of India Act, 1870 (33 Vic c 3) provides for the establishment of an Executive Committee for the Municipal Government of Aden to be appointed and controlled by the Resident which shall have such authority, discharge such functions and exercise such powers within the area to which the Rugulation extends as the Resident may by any rules under the Regulation direct By clause 13 the Resident is authorised, subject to the previous sanction of the Local *Government to make rules to provide for certain* specified matters which include ' the assessment and collection of any toll, cess, tax or other impost imposed under the Regulation "

By clause 11 the power to impose such tolls, cesses taxes and other imposts as are necessary for the purposes of the Regulation is vested in the Resident who may fix the taxes and modes of levying or recovering the same

On the 26th March 1909 the Resident imposed *inter alia* a House and Property Tax and General Sanitary Tax, and on the same day issued rules purporting to be for the assessment and collection of the House and Property Tax and General Sanitary Tax

They provided *inter alia* for the preparation of an assessment list containing " the annual letting value or other valuation on which the property is assessed " for complaints to the Executive Committee where any property was for the first time being entered in the list

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or in which the entered rateable value has been increased, and for appeals against any rateable value to the Judge of the Resident's Court

Rule 12 provides that after appeals, if any, are decided and the results noted in the assessment list all rateable values so entered in the list shall be final subject to such action as may be necessary under rules 17 and 18 to amend the list from time to time

It may be observed that the rules contain no rules for assessment but only directions for the entries to be made in the assessment book after the property has been assessed

This point can be made clear by reference to the City of Bombay Municipal Act (Bombay Act III of 1888) which is expressly referred to by the Notification of Taxes of the 26th March 1909

Sections 146 to 153 of the Bombay Act provide for the persons to be made liable These sections are adopted by reference in the Notification of Taxes but sections 154 and 155, which provide for the mode of assessment have no counterpart in either the rules or the Notification of the Resident

The provision of rule 12 regarding the finality of the rateable value is apparently taken from the first and the last lines of section 219 (*1*) of the Bombay Act but there is no counterpart to the Bombay provision that the decision of the Judge in an appeal against such value shall be final

It is, however, assumed by the Assistant Resident's judgment that the provision that the rateable value shall be final is equivalent to a provision that the decision of the Judge in the rating appeal shall be final

If this was the intention it is curious that the Bombay Government whose previous sanction to the rules was necessary should have sanctioned the omission of the provision that the decision of the Judge in a rating appeal shall be final. It is curious for the reason that the corresponding provision in section 219 of the Bombay Municipal Act was found to require validation by an Act of the Governor-General, viz. Act XII of 1888.

It is just as probable that the provision that the decision should be final was omitted in order not to prevent suits for refund or disputed rates in the Court of the Resident in which suits a case might be stated under the Aden Act for the decision of the High Court as they can be stated by the rating appeal Court in Bombay under the Act XII of 1888, or because there was a doubt as to the legality of limiting by rules the ordinary jurisdiction of the Resident's Court.

We will, however, dispose of the reference now before us on the assumption that the rule 12 is intended to make the decision of the Judge of the Resident's Court in a rating appeal final. On this assumption we think the rule is *ultra vires*.

It is well established that a distinct unequivocal enactment is required for the purpose of either adding to or taking away the jurisdiction of a Court. The Resident's Court had already jurisdiction under the Aden Act of 1864 to hear and determine all cases of whatever nature and whatever value. The rule 12 read as it has been by the Assistant Resident amounts to use the words of Lord Watson in *King v. Henderson* (1) to "the creation of a jurisdiction which the Legislature withheld." It would, if valid, force the aggrieved rate-payer to accept a final decision by a procedure in

(1) [1898] A. C. 720 at p. 729.

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which appeal by way of case stated to this Court would not be open No one disputes that such a result may be obtained by Legislative enactment by a competent authority but authority to achieve such a result by the subordinate legislation of rules cannot be implied, for the presumption is the other way

We are, therefore, of opinion that there is no valid objection to the trial on its merits of the suit instituted by the plaintiffs

We answer the questions put as follows —

(1) In the affirmative

(2) The decision of the lower Court was erroneous

(3) The lower Court was wrong in dismissing the plaintiffs' suit

Costs consequent on the reference to be costs in the suit

Answers accordingly

R R

ORIGINAL CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Batchelor

MAHOMED HAJI ESSACK ELIAS (APPELLANT AND OPPOSING CREDITOR) v SHAIK ABDOOL RAHIMAN BIN SHAIK ABDOOL AZIZ EL EBRAHIM (RESPONDENT AND INSOLVENT) [*]

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August 10 16

The Presidency Towns Insolvency Act (III of 1909) sections 6 8 25 38 39 (2) (a) (b) (c) (d) (f) (g)—Protection order—Appeal lies against a protection order—Opposing creditor though not a decree holder a person aggrieved by the protection order—Protection order a privilege to be granted or withheld according to the character and circumstances of the insolvency—Insolvent guilty of malpractices not entitled to protection

Under section 8 clause (2) (b) of the Presidency Towns Insolvency Act (III of 1909) an appeal lies from a protection order made by a Judge in the exercise of the insolvency jurisdiction

It does not appear from section 8 of the Presidency Towns Insolvency Act that the Legislature wished to put any limitation upon appeals made from original orders of a judge except perhaps orders regulating procedure

The expression any person aggrieved in clause 2 of the last mentioned section is not to be limited to a creditor who has obtained decrees against the insolvent

Every application for protection after refusal or suspension of discharge must be judged on its merits If the insolvent has acted recklessly and dishonestly the fact that he cannot pay is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows A protection order is a privilege to be granted or withheld as the Court in its discretion may determine In exercising that discretion it is relevant and proper for the Court to have regard to the character and circumstances of the insolvency Where a Court finds that the insolvency is of a flagrantly culpable kind being the result of gross extravagance accompanied by grave malpractice and a total disregard of the creditors whose money was squandered protection ought to be refused

Marris v Ingram [1] and *In re Gent Gent Davis v Harris* [2] referred to

[*] Appeal No 26 of 1915 Insolvency Petition No 576 of 1913

[1] (1879) 13 Ch D 338

[2] (1888) 40 Ch. D 190 at p 195

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MAHOMED HAJI ESSACK v. SHAIK ABDOOL RAHIMAN

PROCEEDINGS in Insolvency

The respondent, one Shaik Abdool Rahiman bin Shaik Abdool Aziz, an Arab, Pearl merchant of Bombay was adjudicated an insolvent on 27th October 1913 On the 10th February 1914, the insolvent filed his schedule showing liabilities to the extent of Rs 29,20,199 The realizable assets were shown at about Rs 2 90,000 but the Official Assignee's report showed that only Rs 1,37,000 could be recovered

The insolvent applied for his discharge under section 38 of the Presidency Towns Insolvency Act (III of 1909) On 8th April 1915, his petition was rejected by Davar J, the learned Commissioner sitting in the Insolvency Court While refusing the discharge, his Lordship dwelt at great length upon the insolvent's gross recklessness, extravagance, and numerous malpractices On the 12th April 1915, the insolvent applied for protection from arrest, and on 16th April 1916, the learned Commissioner granted an *interim* protection order for twelve months, delivering the following judgment

DAVAR, J —The insolvent, Shaik Abdool Rahiman bin Shaik Abdool Aziz El Ebrahim, whose discharge I refused on the 8th instant, now applies for a protection order It has been pointed out to me that in a previous case where brother Macleod, as a Judge in Insolvency refused an insolvent his discharge under section 39 of the Presidency Towns Insolvency Act granted him a protection order when the insolvent subsequently applied for it It has also been pointed out that in all cases dealt with under section 39 where discharge is suspended for a stated period, protection order is a matter of course is granted during such period of suspension It must be remembered that I was unable at the hearing to convict the insolvent of any offences under the Act, and I dealt with his case only under

the provisions of section 39 And as I have just observed in all cases of insolvency dealt with under the section where the discharge is suspended, the insolvents have as a matter of course, been granted protection orders during the period of such suspension Only in, I think, two very exceptional cases I withheld protection order for a small portion of the period of suspension In this case the insolvent has two creditors who have obtained decrees against him and if protection order is not granted to the insolvent, it is possible that they may be in a position of greater advantage over the insolvent than his other creditors Besides this the inevitable result of refusing protection order to the insolvent would be to drive him to take refuge in the territories of either the Baroda State or the Portugese Government in the vicinity of Bombay or what is still more probable to drive him to depart to his native country Arabia In this way the insolvent would disappear from British India for the next two years and only return to Bombay to renew his application for his discharge at the end of two years The insolvent's presence is required by the Official Assignee who wants his assistance for the purpose of realizing his assets and administering his estate The insolvent has undertaken not to leave the jurisdiction of this Court without leave previously obtained from this Court and has also undertaken to attend the office of the Official Assignee whenever called upon to do so

Under these circumstances I think the insolvent should be protected from arrest and for the present I grant him an *interim* protection order for twelve months

Costs of the opposing creditors must be paid from the assets of the insolvent

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Against this order, the appellant, an ordinary creditor, filed an appeal

Bahadurji, for the appellant

Desai, for the respondent

Two preliminary points were raised on behalf of the respondent, (1) the *interim* protection order was not appealable, (2) the appellant was not the "person aggrieved" within the meaning of cl (2) of section 8 of the Presidency Towns Insolvency Act

The learned Chief Justice delivered the following judgment on the preliminary points —

SCOTT, C J —Two preliminary objections have been taken to this appeal First, it is said that this is an order which, under the Presidency Towns Insolvency Act (III of 1909), is not appealable Section 8 deals with appeals It is headed with the introductory title of appeals Clause (1) provides that the Court may review, rescind or vary *any* order made by it under its insolvency jurisdiction Clause (2) states that orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows An appeal from an order made by an officer with delegated powers under section 6, which order under that section is to be treated as an order of the Court, lies to the Judge assigned under section 4 to dispose of insolvency matters and no further appeal lies The other orders, being orders made by the Judge himself as original orders, are appealable, and shall lie in the same way and be subject to the same provisions as appeals from orders made by a Judge in the exercise of the ordinary original civil jurisdiction Now, it is to be observed that the first clause deals with *any* orders made under the insolvency jurisdiction The second clause deals with orders in insolvency matters, and there does not appear to us to be any reason for limiting them so as

to include something less than orders referred to in the first clause Clause (*a*) does not indicate that the Legislature wished to put any limitation upon appeals from orders made by the delegated officer and similarly it does not appear to us that it wished to put any limitation upon appeals made from original orders of a Judge except perhaps orders regulating procedure Those appeals must be preferred in the same way and subject to the same provisions as Original Side appeals "In the same way" would refer *inter alia* to the filing of a memorandum of appeal in the Prothonotary's Office and so forth, as provided by the Original Side Rules

"Subject to the same provisions" would be subject to the law of limitation and other statutes enacting adjective law We do not think it should be held that this order made as an original order by the Judge exercising jurisdiction under the Act is not appealable Of course, there may be orders which are merely orders regulating procedure for the convenience of the Court or for the convenience of the parties Such orders we take it, are not affected by these provisions The orders made must be judicial orders intended to decide some point judicially It cannot be contended that the present order is not a judicial order

Then, it is said that an appeal only lies at the instance of any person aggrieved, and it is contended that the appellant who filed this appeal, is not a person aggrieved The order complained of is an order which granted protection, although refusing discharge, to the insolvent, and it is said that such an order only affects the interests of creditors who have obtained decrees and therefore would otherwise have the right of arresting the judgment-debtor But the only reason why the appellant is not himself a judgment-creditor is that the insolvent, since the filing of the appeal, has

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prevented the creditor-appellant from attaining t position by opposing proceedings before the Origi Side Judge which were actually suggested by the solvency Court in order that the appellant mig put himself in the position of an aggrieved person T view that the appellant is not an aggrieved person one which this Court is not disposed to regard w favour under the circumstances, but as counsel the appellant appears also on the instructions of t Alliance Bank, a judgment-creditor and opposing cre tor, who would undoubtedly be an aggrieved pers and consents to be added, and actually applies to added as a party appellant in this appeal, we, pursuance of the powers vested in Courts under s tion 107 of the Civil Procedure Code and Order I, Rule cls (2) and (3), and Order XLI, Rule 33, direct that t Alliance Bank be joined as appellants in this appeal

The appeal must proceed

On further hearing of the appeal, the following jud ments were delivered —

SCOTT, C J —This case comes before us on appeal fro an order of Mr Justice Davar sitting as Judge Insolvency, dated the 16th of April, 1915, whereby th insolvent after refusal of his discharge and notwit standing opposition by a judgment-creditor was give an order protecting him from arrest till April, 1916

The order refusing the insolvent's application for di charge was passed on a judgment of the 8th of April which the reasons for refusing discharge were state and it was shown that numerous facts falling within th categories (a), (b), (c), (d), (f) and (j) of section 39 (2) the Presidency Towns Insolvency Act had been prove against the insolvent It was found *inter alia* that o the day preceding his petition in insolvency the re pondent to make good certain defalcations assigned debt worth Rs 29,000 and properties worth over tw

lies to creditors whom he had defrauded by breaches of trust. The learned Judge stated that he would have tried the insolvent in respect of these assignments under the penal section 103, if it had not been for the decision of the House of Lords in *Sharp* v. *Jackson* [1] which seemed to render a trial on a charge of fraudulent preference hopeless. Nevertheless the learned Judge, because he believed that in almost all cases where the discharge was suspended under the present law, *the insolvent* had, as a matter of course been granted protection for the period of suspension, granted protection for twelve months out of the period of two years which would elapse between the order refusing discharge and a fresh application for discharge by the insolvent.

It is clear that the Court has a discretion in the matter. If an application for protection was necessary in April under section 25, the Court could have refused it for good cause. If ever there can be such good cause, it seems to me to exist in the present case. There is nothing to be said for the insolvent in face of the findings of the learned Judge. We are moreover informed by the Official Assignee that the learned Judge is mistaken in thinking the insolvent's assistance is required for the purpose of realizing assets. All known assets of value had been recorded before the application for discharge. It would, in my opinion, be dangerous as well as unnecessary to adopt any such rule of practice as the learned Judge believed to exist. Each application for protection after refusal or suspension of discharge must be judged on its merits. The Court has no longer power to permit the imprisonment of an insolvent for two years at the suit of a judgment creditor as it had under section 51 of the Indian Insolvent Act: the period of six months is the maximum term of

(1) [1899] A. C. 419.

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civil imprisonment under the Civil Procedure Code But if the insolvent has acted, as here, recklessly and dishonestly, the fact that he cannot pay is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows compare *Marris v Ingram*[1] and *In re Gent Gent-Davis v Harris*[2], cases under the English Debtors' Act of 1869 In my opinion the order of protection now under appeal should be set aside

BATCHELOR, J —This is an appeal in insolvency proceedings from an order made by the learned Commissioner granting the insolvent protection from arrest under section 25 of the Presidency Towns Insolvency Act, 1909 The appellant before us is the Alliance Bank of Simla, a judgment-creditor in the sum of Rs 50,000

The respondent was adjudicated insolvent on 27th October 1913 On 10th February following he filed his schedule, showing liabilities amounting to Rs 29,20,499 The realizable assets are stated to come to Rs 2,90,000 but the amount recovered up to the time of the Official Assignee's report is only Rs 1,37,000, and between that date and this the further sum realised is, we are told the mere driblet of Rs 4,000

On 8th April 1915 the learned Commissioner refused the insolvent's discharge for reasons which he explained in an exhaustive judgment, in which he animadverted in severe terms on the insolvent's recklessness, extravagance and numerous malpractices On 16th April 1915 the same learned Commissioner made the order now under appeal granting the insolvent protection from arrest The question is whether that order should be affirmed

The order is under the Act, a discretionary order in this case it was made by my learned brother, *Davar J*

(1) (1879) 13 Ch D 338 (2) (1888) 40 Ch D 190 at p 19[illegible]

whose experience in the administration of the law of insolvency is far greater than mine It is, therefore, with sincere diffidence that I find myself compelled to take another view , and since we are differing from Davar J, I desire to state my reasons in my own words The conclusion which I reach is based entirely on Davar J s judgment as to the character of this insolvency and on the consequences which seem to me to follow from that character On this point I rely on the following passages in which the learned Commissioner has given his reasons for refusing the respondent s discharge

The Official Assignee in his report says that the insolvent mixed up the monies received by him as receiver with his own money The insolvent on 26th October 1913 a day before he filed his petition in insolvency assigned over and transferred a good debt due by Maneklal Panachand to himself to the heirs of Esa Khalifa of whose estate he was receiver And by this act a sum of Rs 29 000 was disposed of a day before his insolvency It further appears that during the time the insolvent was carrying on business he was entrusted by various Arab merchants with their pearls for the purpose of sale The insolvent pledged those pearls and used the moneys realised by such hypothecation for his own purposes Again on 26th October a day before his insolvency he executed four writings whereby he assigned over and transferred all his interest in certain properties at Basra to secure payment of about Rs 2 10 000 to the Arab merchants whose pearls he had wrongfully and unjustifiably pledged Denuded of all extraneous circumstances the facts which cannot be denied are that the insolvent during the time he was carrying on business as a merchant committed offences of criminal breach of trust in respect of property entrusted to him as receiver and in respect of property entrusted to him for sale as a broker or commission agent In order to save himself from criminal prosecutions which he apprehended would be started against him on its being known that he was insolvent or unable to meet his liabilities he parted with properties worth approximately Rs 2 40 000 on the day preceding his insolvency I have to take into consideration certain facts admitted by the insolvent himself In addition to doing the pearl business he kept a racing stud The Official Assignee in his report says that his racing expenses came to seven lacs of rupees spread over a period of six years The statement as to seven lacs is correct but the statement as to the period is not correct To be exact it appears that he spent a sum of Rs 6 98 340 from November 1910 to October 1913 on his racing stud He

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was living in a style and expending moneys (in a way) which I venture to think very few citizens of Bombay have done even though they may be admitted millionaires His books give no indication as to what his profits were or whether there were profits at all and in what year there were profits or losses He has kept books but he might well have omitted keeping books at all because the books that he has kept are of no value whatever The books are not balanced balances are not drawn nor are they carried forward and quite light heartedly the insolvent admits that entries in respect of all payments and receipts do not appear in his books If they do not the value of those books is absolutely nil It seems to me that a man who is capable of regarding money in the light in which the insolvent has regarded it and of dealing with his own and other people's moneys in the reckless manner in which he has done that such a man as a merchant is a danger to the public His assets are not equal to four annas in the rupee The Official Assignee reports that in his opinion the insolvent cannot be held liable for his assets not being equal to four annas in the rupee on his unsecured liabilities I differ from that conclusion altogether It seems to me there can be no question whatever that the insolvent is solely and wholly responsible for his present state of affairs There can be no question that the insolvent continued to trade when he must have well known that he was in insolvent circumstances A man does not incur debts to the extent of twenty nine lacs of rupees without realising that he is insolvent and a debt of this description is not incurred in a day or a month His indebtedness and insolvency must have been growing and growing continuously as every month of his reckless life progressed and he must have been conscious long before he filed his petition that he was living a riotous and extravagant life at the expense of his creditors He continued his business right up to the end with the fullest knowledge that he was dissipating his creditors moneys

The learned Commissioner concluded by finding against the insolvent that there was complete proof of the facts mentioned in cls (a), (b), (c), (d), (f) and (j) of sub section 2 of section 39 of the Act, and by expressing his regret that he could inflict on him no higher punishment than the refusal of his discharge From this judgment there was no appeal, and this, therefore, is the state of facts in which we have now to decide whether this insolvent is entitled to a protection order

It is I think certain from the judgment of Davar J., that the only reason why he felt himself unable to

enforce the penal provisions of the Act was that, in view of *Sharp v Jackson*[1], he reluctantly concluded that criminal proceedings could not succeed as it would be open to the insolvent to plead that his immediate and direct motive in benefiting some creditors at the expense of others was to save himself from the criminal prosecution, to which his own acts had exposed him I agree with Davar J, that, under the law as it stands, such a plea would suffice to save the insolvent and, since that is the law we must give effect to it whether it is a satisfactory condition of the law must be left to the authorities whose province it is to consider such matters What concerns us now is to decide whether the character of the insolvency has, or has not, any bearing upon the question whether the insolvent is entitled to protection if it has, then, I think, it follows without further argument that this insolvent is disentitled The contention for the insolvent goes, and must necessarily go, to this extent, that when once the Court finds itself for whatever reason, technical or substantial, unable to enforce the penal provisions it must shut its eyes altogether to the character of the insolvency, and must consider exclusively the financial interests of the general body of the creditors I can find nothing in the Act to countenance this view, though of course the interests of the creditors must receive some consideration As I understand section 25, a protection order, though *prima facie* the insolvent is entitled to it, is still a privilege, to be granted or withheld as the Court in its discretion may determine, and the proposition on which I found my judgment is merely this, that, in exercising that discretion, it is relevant and proper for the Court to have regard to the character and circumstances of the insolvency Here the insolvency was, as I have shown, of a flagrantly

(1) [1899] A. C 419

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culpable kind, being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money was squandered That protection should ordinarily be granted, does not signify here, for this is an extraordinarily bad case, and if it is not refused here, it must follow that it could never be refused, a consequence which, in my opinion, would conflict with the provisions of the section I must add that the recent commercial history of Bombay is not such as to encourage the Courts to interpret the Act in a manner calculated to favour reckless speculation with other people's money, and that, I think, would be the effect of allowing insolvents to suppose that, to whatever lengths they may go in misconduct or dishonesty, they may count on immunity from the one fear that might act as a deterrent, the fear of the stigma of imprisonment It is, in my opinion, no answer to say that the creditors would be better off if the insolvent were at large, for I can see no very appreciable difference to the creditors whether he is at large or in jail, nor does it appear that there is any concealed property which the insolvent could produce Moreover I think that even if his freedom could be shown to be of some advantage in the collection of assets, that advantage might well be sacrificed for the more obvious need of showing the Court's disapproval of the insolvent's conduct Lastly, I do not feel embarrassed by the contention that the refusal of protection would merely confer a special advantage on the appellant Bank to the possible disadvantage of the general creditors It seems to me that a creditor who has put himself in a position to invoke and to deserve the exercise of certain powers conferred on the Court is entitled to the Court's order in his favour In fine all these possible disadvantages, more or less remote must be taken to have been within the contemplation of the

Legislature, which yet has seen fit to empower the Court to refuse protection in suitable cases, and I can scarcely imagine a more suitable case than this As to *In the matter of Meghraj Gangabux*[1], that being the decision of a single Judge, is not binding on this Bench, and there the only point decided was as to the grant of protection pending the inquiry into the insolvent's conduct prior to the Court's decision on his application for discharge It is true that certain general observations are to be found in the judgment, but they must, I think, be read as limited by the facts then before the Court and the case cannot in my opinion, be properly cited as an authority for any hard and fast rule

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Mahomed Haji Essack v Shaik Abdool Rahiman

For these reasons I agree that the protection order granted in this case should be set aside

Attorneys for the appellant Messrs *Little & Co*

Attorneys for the respondent Messrs *Payne & Co*

Order set aside

G G N

ORIGINAL CIVIL

Before Mr Justice Macleod

SEWARAM GOKALDAS Plaintiff v BAJRANGDAT HARDWAR POTDAR Defendant*

1915 September 20

Suit on a Hundi—Hundi passed up country and not made payable in Bombay—Consideration of the hundi being the balance of account between the Bombay merchant and the up country merchant—Account settled up country—Jurisdiction of the High Court—Letters Patent cl 12—Leave of the Court to sue—Cause of action

(1) (1910) 35 Bom 47

* O C J Suit No 875 of 1915

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SEWARAM GOKALDAS v. BAJRANGDAT HARDWAR

The plaintiffs carrying on business in Bombay had dealings with the defendant residing and carrying on business at Bassum in Akola. The account between the parties was made up and settled at Bassum as a result of which the defendant passed at Bassum two *hundies* drawn on his own firm for Rs 900 and Rs 1,000 respectively in favour of the plaintiffs. On the failure of the defendant to meet the said *hundies* at the due dates the plaintiffs brought a suit in the High Court at Bombay to recover the amount due on the same. The defendant pleaded that the Court had no jurisdiction to entertain the suit as the moneys were not payable in Bombay. The plaintiffs contended that as the consideration of the *hundies* was the balance of the account due by the defendant to the plaintiffs in respect of the transactions effected in Bombay the moneys were virtually payable in Bombay and the material part of the cause of action arose in Bombay.

Held that the cause of action being founded upon the *hundies* and the *hundies* not being made payable in Bombay, the Court had no jurisdiction to entertain the suit.

Per MACLEOD J.—In giving leave under cl. 12 of the Letters Patent in suits on promissory notes or *hundies* I have always given leave when the money was payable in Bombay and in my opinion if there are transactions in Bombay which result in a credit in favour of the Bombay merchant against an up country merchant and if the Bombay merchant goes to settle his account up country and accepts a promissory note or *hundi* in satisfaction of his account then if he wants to sue on that note in Bombay he must take the precaution to see that the note is made payable in Bombay.

THE facts of the case are sufficiently set out in the judgment of the learned Judge.

Strangman, for the plaintiff.

Desai, for the defendant.

MACLEOD, J.—The plaintiffs, carrying on business in Bombay, had dealings with the defendant, who is said to carry on business at Bassum in Akola under the style of Chatandas Shankardas. The plaintiffs say that the account was settled in 1912 between the parties. The defendant, after paying a certain amount in cash, passed two *hundies* for Rs 900 and Rs 1,000, respectively, drawn on his own firm by the defendant payable in Bombay 181 and 361 days after sight, respectively.

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SEWARAM GOKALDAS v. BAJRANGDAT HARDWAR

As those *hundies* were not met when they fell due, the plaintiffs brought this suit for the recovery of the amount

Paragraph 5 of the plaint states that the defendant resides at Bassum, that the *hundies* were passed at Bassum but the consideration of the *hundies* was the balance of the account due by the defendant to the plaintiffs in respect of transactions effected in Bombay and the moneys were payable to the plaintiffs in Bombay and a material part of the cause of action arose in Bombay

Leave was obtained under cl 12 of the Letters Patent to file the suit in Bombay

The question has now arisen whether any part of the cause of action has arisen within the local limits It must be admitted, on an inspection of the *hundies* that the statement in the plaint that the *hundies* were payable in Bombay is incorrect But it is contended that the consideration for the *hundies* was the balance of account due by the defendant to the plaintiffs in respect of transactions effected in Bombay The question is whether that was a part of the cause of action The point apparently does not seem to have arisen before but if the whole cause of action consists of those facts which it is necessary for the plaintiffs to prove in order to succeed in getting a decree then it was not necessary to prove the transactions out of which the present claim arose, as the claim on those transactions was satisfied by the passing of the *hundies* and under the Negotiable Instruments Act the consideration for the *hundies* must be presumed, so the plaintiffs are entitled to a decree merely on production of the *hundies* unless the defendant can show that there was no consideration In giving leave under cl 12 of the Letters Patent in suits on promissory notes, or *hundies*, I have always given leave when

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SEWARAM GOKALDAS v. BAJRANGDAT HARDWAR

the money was payable in Bombay, and refused leave when the money was payable out of Bombay, and, in my opinion, if there are transactions in Bombay, which result in a credit in favour of the Bombay merchant against an up country merchant, and if the Bombay merchant goes to settle his account up country and accepts a promissory note or *hundi* in satisfaction of his account, then if he wants to sue on that note in Bombay he must take the precaution to see that the note is made payable in Bombay

Unfortunately, the plaintiffs, when they applied for leave, made a mis statement in the plaint upon which I relied in granting the leave If I had been aware that the facts stated in the plaint were incorrect I should have refused the leave

Therefore, I must hold now that the Court has no jurisdiction

The plaint should be returned to the plaintiffs for presentation in the proper Court

The plaintiffs to pay the defendant s costs

Solicitors for the plaintiffs Messrs *Tyabji Dayabhai & Co*

Solicitors for the defendant Messrs *Maneklal & Co*

Plaint returned

G G N

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

MOHANLAL NAGJI (ORIGINAL PLAINTIFF), APPELLANT *v.* BAI KASHI (ORIGINAL DEFENDANT), RESPONDENT.* 1916 February 2

Civil Procedure Code (Act V of 1908), section 110—Privy Council—Leave to appeal—Suit for declaration and injunction tried by the Second Class Subordinate Judge—Value of the subject matter can be shown by evidence for the purposes of the leave.

A suit for declaration and injunction in which the claim was valued at Rs. 135 was tried by a Subordinate Judge of the Second Class. The decree was confirmed by the District Judge but reversed by the High Court on second appeal. The plaintiff having applied for leave to appeal to the Privy Council, the defendant contended that as the plaintiff himself had elected to value his suit at only Rs. 135 and conducted it in the Court of the Subordinate Judge, the limit of whose pecuniary jurisdiction was Rs. 5,000, he could not contend that the subject matter of the suit was worth Rs. 10,000.

Held, overruling the contention, that the suit being one for declaration and injunction the plaintiff by suing in the Second Class Subordinate Judge's Court seemed to have made neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected as distinguished from the fiscal value which as the law allowed him to do he placed upon the relief which he was seeking.

Harjibhai v. Jamshedji[1], distinguished.

THIS was an application for leave to appeal to the Privy Council.

Suit for declaration and injunction.

The plaintiff brought the suit to obtain a declaration that he was the adopted son of one Nagji and an injunction restraining the defendant from obstructing him in getting possession of the properties belonging to Nagji. The claim in the suit was valued at Rs. 135. The suit was tried by the Second Class Subordinate Judge at Broach who decreed the claim. The decree was confirmed by the District Judge but reversed by the High Court on second appeal.

* Civil Application No. 483 of 1915.

(1) (1913) 15 Bom. L. R. 1021.

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The plaintiff thereupon applied to the High Court for leave to appeal to the Privy Council

Jayakar, with *G N Thakor*, for the opponent —We have a preliminary objection to urge The petitioner has valued his claim in his plaint at Rs 135 It is not now open to him to show that the value of the subject matter is Rs 10,000 for the purposes of sections 109 and 110 of the Civil Procedure Code see *Hirjibhai* v *Jamshedji*[1]

Setalvad, with *N K Mehta*, for the petitioner — The case of *Hirjibhai* v *Jamshedji*[1] is clearly distinguishable In that case, the Subordinate Judge could not have passed a decree in plaintiff's favour for more than Rs 5,000, even if on taking accounts, a sum exceeding that amount had been found due In the present case, however, the relief asked for was declaration and injunction, which the trial Court could grant irrespective of the value of the subject matter see also *Chunilal Parvatishankar* v *Bai Samrath*,[2] *Baboo Lekraj Roy* v *Kanhya Singh*,[3] *Pichayee* v *Sivagami*[4] and *Hari Mohan Misser* v *Surendra Narain Singh*[5]

BATCHELOR, J —This is an application for leave to appeal to the Privy Council, the applicant being the original plaintiff in the suit The suit was filed for a declaration that the plaintiff was the adopted son of one Nagji Vithal and for an injunction restraining interference by the defendant

The suit was originally instituted in the Court of the First Class Subordinate Judge at Broach It so happened that he was the only Subordinate Judge then at Broach

[1] (1913) 15 Bom L R 1021
[2] (1914) 38 Bom 399
[3] (1874) L. R 1 I A 317
[4] (1891) 15 Mad. 237
[5] (1903) 31 Cal 301

and by him the suit was transferred for hearing to the Second Class Subordinate Judge It was contended by Mr Jayakar that as the trial before the Second Class Subordinate Judge was acquiesced in by the plaintiff, the result is the same as if the suit had been filed in the Court of the Second Class Subordinate Judge That position has not been contested, and I will assume for the purposes of my judgment that this part of Mr Jayakar's argument is unassailable

The trial Court found in favour of the plaintiff, and that decree was confirmed on appeal by the learned District Judge But in the appeal to the High Court which was heard by my learned brother Shah and myself, we came to another conclusion, being satisfied that there had been the exercise of undue influence by the plaintiff Therefore we reversed the decision of the lower Court and dismissed the plaintiff's suit From that decree the plaintiff now seeks to go in appeal to the Privy Council

The suit as instituted by the plaintiff was valued by him at the sum of Rs 135, and this present application is met at the outset by the objection that the plaintiff cannot now be heard to say that, within the language of section 110 of the Civil Procedure Code the amount or value of the subject matter in dispute on appeal is Rs 10,000 or upwards The argument is that since the plaintiff himself elected to value his suit at only Rs 135 and conducted it in the Court of the Subordinate Judge the limit of whose pecuniary jurisdiction was Rs 5 000 he cannot now contend that the subject-matter of the suit is worth Rs 10 000 It is urged in support of this argument that the word subject matter occurring in section 110 of the Civil Procedure Code must be used in the same sense which the expression bears in section 24 of the Bombay Civil Courts Act This argument is

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based upon the decision of the Chief Justice and Mr Justice Beaman in *Haribhai* v *Jamshedji* (1) That was a suit brought in the Court of the Second Class Subordinate Judge for taking accounts, and the claim was valued at Rs 101 for the purposes of court-fees and jurisdiction The plaintiff, however, in applying for leave to appeal to the Privy Council alleged that the amount or value of the subject-matter of his suit was far in excess of Rs 10,000 The Court decided against him, and the scope of the decision is stated very clearly towards the end of Mr Justice Beaman's judgment where we read —

'We are therefore very clearly of opinion that the proposition we began by stating is correct and has been supported by good reasoning in the case of *Golap Singh* v *Indra Coomar* (2) That proposition is that the amount or value of the subject matter of a suit can in no case exceed the limits of the pecuniary jurisdiction of the Court in which it is instituted It follows that the amount or value of the subject matter of a suit for the purposes of section 109 clauses (*a*) and (*b*) and section 110 of the Civil Procedure Code if that suit is instituted in a Court the pecuniary limit of whose jurisdiction is Rs 5 000 can never be greater than Rs 5 000

Though the facts of the present case are in some respects different from those of the application before the Chief Justice and Mr Justice Beaman, notably in this respect that whereas that was a suit for accounts this was merely a suit for an injunction and declaration yet I am not prepared to hold that the present application can be taken out of the scope of the decision in *Haribhai* v *Jamshedji*(1) in so far as that decision interprets the words occurring in the first paragraph of section 110 of the Civil Procedure Code—I mean the words 'the amount or value of the subject matter in dispute on appeal to His Majesty in Council.' But even supposing that Mr Jayakar is successful in bringing this part of his application within the ambit of the decision which I have quoted, it remains to consider

(1) (1913) 15 Bom L R 1021

(2) (1909) 13 C W N 493

whether the petitioner is not entitled to obtain leave to appeal under the second paragraph of section 110. For the section enacts that a petitioner is so entitled if, in the circumstances which are now before us, the decree or final order must involve directly or indirectly some claim or question to or respecting property of like amount or value. For the purposes of the present argument we are assuming that the property affected by our decree exceeds in value the sum of Rs. 10,000. And the argument which we have to consider is whether upon that assumption there is anything in the past conduct of the present petitioner which should, as by a species of an estoppel, debar him from asserting and proving, if he can, that such is the value of the property affected. In my opinion there is nothing which should debar him. And in this respect the application is, I think, clearly distinguishable from the facts which were before the Court in *Harjibhai's case*.[1] That, as I have said, was a suit for accounts, and the plaintiff elected as his forum the Court of a Subordinate Judge whose pecuniary jurisdiction was limited to Rs. 5,000. The Court, therefore, for reasons which may readily be appreciated, held the plaintiff bound by this action of his to acquiescence in the statement that the value of the subject-matter of his suit could not exceed Rs. 5,000. Here, however, our facts are otherwise. The suit was, as I have said, brought only for an injunction and a declaration. By a series of decisions of this Court, which are at present binding upon us, and of which I need notice only the case of *Vachhani Keshabhai v. Vachhani Nanbha*,[2] it is the law in this Presidency that it is open to a plaintiff to sue in a Second Class Subordinate Judge's Court for a declaration and injunction even though the immoveable property referred to or affected by the injunction exceeds the pecuniary limit, i.e., Rs. 5,000, of the Second Class Subordinate

[1] (1913) 15 Bom. L. R. 1021. [2] (1909) 33 Bom. 307.

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Judge's jurisdiction That being so, the plaintiff this case by suing in the Second Class Subordina Judge's Court seems to have made neither directly n indirectly any sort of representation to the defenda as to the real or market value of the property to affected, as distinguished from the fiscal value whic as the law allowed him to do, he placed upon the reli which he was seeking

Admittedly, the decision in *Hirjibhai* v *Jamshedj* proceeds upon the reasoning that a plaintiff should n be allowed to put inconsistent values upon the subjec matter of his claims at different times according the shifting character of his interests But if I a right in what I have already said, it will be clear th this reasoning cannot affect the present plaintiff Fo the merely fiscal valuation which he put upon the in junction and declaration which he sought is wholl independent of the real or market value of the immove able properties

I am consequently of opinion that the decision in *Hirjibhai* v *Jamshedji*[1] cannot be invoked so as to shut out the present plaintiff from appealing to the Privy Council if he succeeds in proving that the condition described in the second paragraph of section 110 is in his case satisfied, that is to say, if he can succeed in proving that the decree or final order must involve directly or indirectly some claim or question to or res pecting property of the value of Rs 10 000

In my opinion, therefore, he must have an opportuni ty of proving that that is the value of the property

As the affidavits which have been put in on both sides with reference to the question as to the value of the property are in direct conflict we think it desir able to act under the powers given to us by Order XLV,

[1] (1913) 15 Bom L R 1021

Rule 5 of the Code. Under that Rule, therefore, we refer to the Court of first instance the dispute as to the amount or value of the property which must be involved directly or indirectly by the decree or final order in this appeal. It is conceded that the Sutarel property is no part of the property in suit which is concerned only with the property at Derol. The Court of first instance will take evidence and report on the question referred to it.

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SHAH, J.—I entirely agree.

Order accordingly.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1916. February 15.

CHHITA BHULA (ORIGINAL DEFENDANT No. 3), APPELLANT *v.* BAI JAMNI DAUGHTER OF BHIMA BHULA (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Tagavi advance by Government, nature of—Auction sale for non-payment of the advance—Benami purchase by the mortgagee—Advantage gained in derogation of the rights of the mortgagor—Purchase enures for the benefit of the mortgagor—Indian Trusts Act (II of 1882), section 90—Transfer of Property Act (IV of 1882), section 6, clause (c)—Land Revenue Code (Bom. Act V of 1879), section 56, 153—Land Improvement Loans Act (XIX of 1883), section

One B. pa el a San mortgage of the properties in suit in favour of N. on the 20th September 1894. After B.'s death his widow K. for herself and on behalf of her minor daughter the plaintiff executed a fresh possessory mortgage in favour of Defendant No. 1 in 1903 and put him in possession. Before the date of this mortgage K. had obtained a *tagavi* advance from Government on Survey No. 311 which was included in the mortgage. In 1905 Survey No. 311 was sold by public auction for the arrears of *tagavi*

* Second Appeal No. 41 of 1915.

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and was purchased by defendant No 1 through his gumasta defendant No 2 On the 4th August 1909 defendant No 1 assigned his mortgage rights to defendant No 3 and on the same day defendant No 2 sold Survey No 311 to defendant No 3 In 1912 the plaintiff sued to redeem the survey number along with the other mortgaged property under the provisions of the *Dekkhan Agriculturists Relief Act 1879* The defendant No 3 contended that since the sale the plaintiff had no right left in Survey No 311 and was not entitled to redeem it On the pleadings the question arose for consideration whether the *tagai* dues were a charge of public nature which the mortgagee was bound to pay and whether the sale having taken place the provisions of section 56 of the Land Revenue Code would apply so as to leave no room for the application of section 90 of the Indian Trusts Act with reference to the conduct of the mortgagee

Held that the *tagai* advance was a charge of a public nature within the meaning of clause (c) of section 76 of the Transfer of Property Act 1882 It was a Government demand accruing due in respect of the land while it was in possession of the mortgagee

Held also that the sale having taken place owing to the default of the mortgagee section 90 of the Indian Trusts Act applied

Held further that section 56 of the Land Revenue Code did not apply as it was held as a fact that there had been no forfeiture such as would be a necessary condition precedent under section 153 of the Land Revenue Code to the application of the provisions of section 56 for the purposes of recovering dues as arrears of land revenue

SECOND appeal against the decision of P T Talevar Khan, District Judge of Broach amending the decree passed by B H Desai Subordinate Judge at Anklesh war

Suit for redemption

The properties in suit were originally mortgaged in San by one Bhima (plaintiff's father) to defendant No 1's grandfather Nanotum on the 20th September 1891

After Bhima's death his widow, Kohili, for herself and on behalf of her minor daughter the plaintiff executed a fresh possessory mortgage in favour of defendant No 1 in 1903, and put him in possession Before the date of this mortgage Kohili had obtained

a *tagavi* advance from Government on Survey No 311 which was included in the mortgage

In 1905 the Survey No 311 was sold by public auction for the arrears of the *tagavi* amounting to Rs 26-10-0, and was purchased by defendant No 1 through his gumasta defendant No 2 for Rs 27-10-9

On the 4th August 1909, defendant No 1 assigned his mortgage rights to defendant No 3 and on the same day defendant No 2 also sold Survey No 311 to defendant No 3

In 1912 the plaintiff brought a suit to redeem and to recover possession of the plaint properties under the provisions of the Dekkhan Agriculturists Relief Act, 1879

The defendant No 3, who was the plaintiff's paternal uncle and also the mortgagee's tenant of the mortgaged property, contended *inter alia* that since the auction sale the plaintiff had no right left in Survey No 311 and was not entitled to redeem it that the claim in regard to the land was barred by limitation

The defendants Nos 1 and 2 did not appear at the trial

The Subordinate Judge held that the purchase by the mortgagee had enured for the plaintiff's benefit that defendant No 3 was not a *bona fide* purchaser without notice and was in the same position as the mortgagee, that the claim in regard to the Survey No 311 was not time-barred as contended A decree was, therefore, passed allowing the plaintiff redemption of all the properties including Survey No 311

The District Judge, in appeal, confirmed the decree on the following grounds —

All these facts taken together warrant the conclusion that in allowing the land to be sold for the *tagavi* dues and buying it himself through defendant No 2 the first defendant had availed himself of his position as mo

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to gain an unfair advantage in derogation of the rights of the plaintiff who was then a minor That being so, section 90 of the Indian Trusts Act applies and the purchase must be held to have enured for the benefit of the plaintiff subject to repayment by her of the money expended by defendant No 1 in purchasing the property It is however contended that section 56 of the Land Revenue Code precludes the application of section 90 of the Indian Trusts Act to the facts of the present case *Section 56 of the Land* Revenue Code is construed by the appellant s pleader to mean that where land is forfeited for arrears of land revenue (or *tagavi*) and then disposed of by sale no person can claim any equity against the purchaser unless the Collector otherwise directs In the first place however there is nothing on the record to show the sale in the present case was preceded by forfeiture On the contrary it appears from the sale certificate Exhibit 14 that the land was sold as the property of the defaulter Kohli and not as Government land It is however urged that the sale must have been preceded by forfeiture as sections 150 153 and 155 of the Code show that the land in respect of which arrears of revenue are due cannot be sold without forfeiture in the first instance though other land of the defaulters cannot be sold without such preliminary and under section 7 (*c*) of the Land Improvement Loans Act (XIX of 1883) a loan granted under the Act is recoverable out of the land for the benefit of which the loan has been granted—as if they were arrears of land revenue due in respect of that land It may however be that the expression out of the land was understood to mean that arrears of *tagavi* could unlike arrears of land revenue be recovered by sale of the land in respect of which they were due without the preliminary process of forfeiture Having regard to the wording of the sale certificate and the absence of any evidence that the sale was preceded by forfeiture I must take it that the land was in fact sold without any such preliminary But even if it was otherwise it could in my opinion make no difference in the application of section 90 of the Trusts Act to the facts of this case For all that section 56 of the Land Revenue Code lays down is that the land when disposed of by sale or otherwise shall unless the Collector otherwise directs be deemed to be freed from all tenures rights incumbrances and equities theretofore created in favour of any person other than Government in respect of the land This evidently refers to tenures rights incumbrances and equities created by the owner of the land in favour of third persons previous to the disposal of the land by the Collector It is these and these only which cease to subsist on the land being sold or otherwis di p l of The equity however which the plaintiff claims in this case had arisen in favour of the owner of the land and it had arisen on the land being purchased by defendant No 1 at the auction sale and did not subsist before The equity that had arisen was that the purchase had enured for the benefit of the plaintiff, or to use the words of section 90 of the Indian Trusts Act the

plaintiff was entitled to the benefit of the advantage which defendant No 1 had gained in derogation of her rights by availing himself of his position as mortgagee It may further be noted that the proviso to section 7 of the Land Improvement Loans Act supersedes the provisions of section 56 of the Land Revenue Code in the case of sale of land for the realization of arrears of *tagavi*

The defendant No 3 appealed to the High Court

T R Desai for the appellant —The following questions arise on the facts (1) Whether *tagavi* advances granted to the mortgagor by the Government are charges of a public nature which the mortgagee is bound to pay under section 76 of the Transfer of Property Act 1882 (2) what is the effect of sale of equity of redemption of the mortgagor for default in payment of *tagavi* advances under section 56 of the Land Revenue Code, 1879

As to the first point we submit that the *tagavi* advances are neither arrears of rent nor are charges of a public nature within the meaning of section 76, clause (*c*) of the Transfer of Property Act, 1882 They are not arrears of land revenue and though they may be recovered as such, that does not make them ' public charges " see section 5 Agricultural Loans Act (XII of 1884) and section 7 Land Improvement Loans Act (XIX of 1883) The *tagavi* was an advance to the mortgagor and if there was default in payment on his part there was no liability on the mortgagee to pay If so the mere fact that the mortgagee s man purchased at the revenue auction sale could not bring the case within section 90 of the Indian Trusts Act (II of 1882) The mortgagee could not be said to have availed himself of his position as such, as contemplated by that section There was no gain in derogation of mortgagor's rights when the mortgagor deliberately committed default

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Secondly, in any case, section 56 of the Land Revenue Code, 1879, bars any right whatever of the mortgagor There was a forfeiture for default followed by sale As held in *Vedu Shivlal* v *Kalu Ukhardu*[1] the property sold goes to the purchaser free of all incumbrances

B F Dastur, for the respondent —Defendant was uncle of the minor He knew all the facts He was thus in the position of a trustee and not a mere outsider Besides the mortgage deed should be read in a broad comprehensive sense The term "Government dues" in that deed would include *tagavi* advances, so there was a covenant to pay and section 90 of the Indian Trusts Act would apply In that case it would be a finding of fact, for, the lower Courts held that defendant No 1 took advantage of his position and sought to make profit by *benami* purchase in the name of his clerk The defendant No 3 stands in the shoes of his alleged vendors and cannot resist the redemption suit as to Survey No 311

We further submit that section 56 of the Land Revenue Code cannot apply It cannot over-rule section 90 of the Indian Trusts Act The circumstances in *Vedu Shivlal* v *Kalu Ukhardu*[1] were different

SCOTT, C J —From the year 1894 to 1903 the 1st defendant was a San mortgagee of certain lands mortgaged to him by the plaintiff's father In 1900 the mortgagor died, and in the following year his widow Kohili for the benefit of those interested in the property took an advance by way of *tagavi* from the Mamlatdar, and gave a charge upon one of the survey numbers namely 311, as collateral security for payment of the loan In June 1903 acting on behalf of herself and the plaintiff, her minor daughter, she executed a mortgage

[1] (1913) 15 Bom L R 827

deed with possession in favour of the 1st defendant and put him in possession of all the property previously charged under the San mortgage including the Survey No 311 The plaintiff has brought this suit in 1912 to redeem, she being entitled to the benefit of the Dekkhan Agriculturists Relief Act

The only question in the appeal is with reference to Survey No 311 That survey number was sold in or about 1906 to satisfy the claim of Government in respect of the *tagavi* advance and it was purchased ostensibly by the 2nd defendant who was the *gumasta* of the 1st defendant mortgagee From him it was subsequently purchased by the 3rd defendant who is the uncle of the plaintiff and who had for many years been cultivating the land as tenant under the mortgagee, and prior to the mortgage under the mortgagor The 3rd defendant claims to be entitled to hold Survey No 311 free from any liability to be redeemed by the mortgagor Upon the findings of the lower Court he must be held to have had notice of everything that occurred in connection with the property, and cannot claim the position of a *bona fide* purchaser without notice of Survey No 311, if there were in fact any claims enforceable against the vendor with reference to that plot It must also be taken on the findings of fact of the lower Courts that the 2nd defendant, purchaser was a *benamudar* for the 1st defendant, mortgagee

It is contended on behalf of the plaintiff that the mortgagee has in effecting the purchase availed himself of his position as mortgagee to gain an advantage in derogation of the rights of the mortgagor If the sale took place at the instance of the Mamlatdar in consequence of some wilful default on the part of the mortgagee it may fairly be said that in acquiring the property through his *benamudar* at such sale he has availed himself of his position as mortgagee to gain an advantage of

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CHHITA BHULA v. BAI JAMNI

the kind spoken of in section 90 of the Trusts Act The question therefore is whether the sale took place owing to his default Section 76 of the Transfer of Property Act lays down that "when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, and all other charges of a public nature accruing due in respect thereof during such possession" So far from there being no contract to the contrary in the mortgage deed, the mortgagee agrees henceforth to pay all Sarkari claims in relation to the property The expression which we have translated "claims" is an expression which is not usual to describe merely Government revenue The point has been dealt with by the learned District Judge as follows —'Are *tagavi* dues 'a charge of a public nature' within the meaning of clause 76 (*c*) I think they are I think that the clause should be liberally construed, as it has for its object the protection of the land from forfeiture or sale for default in payment of Government demand accruing due in respect of the land while it is in the possession of the mortgagee' It is clear, therefore, that he had in his mind the question whether this was a Government demand accruing due in respect of the land while it was in the possession of the mortgagee, and he comes to the conclusion that it was It is argued that as the *tagavi* advance preceded the mortgage with possession, it would not be a Government demand accruing due in respect of the land while in the possession of the mortgagee That is a question which might have been settled by evidence, if it had been put in issue in the lower Court the learned Judge feels no doubt as to what the answer should be and we are not prepared in Second Appeal to entertain any doubt as to the correctness of his finding That being so, section 90 of the

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Trusts Act would apply, because the sale has taken place owing to the default of the mortgagee But it was said that once the sale takes place the provisions of section 56 of the Land Revenue Code would apply, and, if so, there would be no room for the application of section 90 with reference to the conduct of the mortgagee as such, because *ex-hypothesi* the operation of section 56 of the Land Revenue Code would have extinguished all rights of the mortgagee We are of opinion that section 56 of the Land Revenue Code does not apply, as it has been held as a fact that there has been no forfeiture such as would be a necessary condition precedent under section 153 of the Land Revenue Code to the application of the provisions of section 56 for the purpose of recovering dues as arrears of land revenue The argument also appears to us to be slightly circuitous, because *ex-hypothesi* it is by reason of his default as mortgagee and by his improperly availing himself of his position as mortgagee that the sale has taken place How then can it be said that he is to obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee through his fraudulent action as mortgagee? This it appears to us is also the answer to a point which we do not think was appreciated by the learned District Judge a point of the same nature as that argued under section 56 of the Land Revenue Code and based upon the words of the proviso to section 7 of the Land Improvement Loans Act which by implication would put an end upon the sale by the Collector for recovery of a Government loan, to the interest of the borrower and of the mortgagee of that interest For these reasons we think that the decree of the lower appellate Court was right and should be affirmed with costs

Decree confirmed

J G R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

1916
February 28

KASHINATH VINAYAK BARVE (ORIGINAL PLAINTIFF) APPLICANT *v* RAMA DAJI KALE (ORIGINAL DEFENDANT) OPPONENT [*]

Dekkhan Agriculturists Relief Act (XVII of 1879) section 15B†—Payment by instalments—Default in payment—Order for sale of necessary portion of property under section 15 B (2)—Application to make the decree final under Order XXXIV Rule 5 (2) of the Civil Procedure Code not necessary

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[*] Civil Reference No 1 of 1916

† 15 B (1) The Court may in its discretion in passing a decree for redemption foreclosure or sale in any suit of the descriptions mentioned in section 3 clause (y) or clause ( ) or in the course of any proceedings under a decree *for redemption foreclosure or sale passed in any such suit whether before or* after this Act comes into force direct that any amount payable by the mortgagor under that decree shall be payable in such instalments on such dates and on such terms as to the payment of interest and where the mortgagee is in possession as to the appropriation of the profits and accounting therefor *as it thinks fit*

(2) If a sum payable under any such direction is not paid when due the Court shall except for reasons to be recorded by it in writing instead of making an order for the sale of the entire property mortgaged or for foreclosure order the sale of such portion only of the property as it may think necessary for the realization of that sum

(3) In passing a decree for redemption or foreclosure in any such suit as *aforesaid the Court may direct that* the amount payable by the mortgagor shall be discharged by continuing the mortgagee in possession for such further period as will enable him to recover his principal with reasonable interest and that on the expiry of such period the property *mortgaged* shall be restored to the mortgagor

(4) When the amount payable to a mortgagee in *possession* has been determined in any such suit as aforesaid the Court may in its discretion instead of making an order for payment thereof direct that the mortgagee be continued in possession for such period (to be specified by the Court) as *will* in the opinion of the Court be sufficient to enable him to recover from the profits the amount payable by the *mortgagor together* with reasonable *interest* and that on the expiry of such period the property mortgaged *shall be restored* to the mortgagor

A decree holder for sale upon a mortgage in default of payment of instalments ordered under section 15 B (1) of the Dekkhan Agriculturists Relief Act (XVII of 1879) need not apply under Order XXXIV, Rule 5 (2) of the Civil Procedure Code to make the decree final before he can apply for sale of the necessary portion of the property under section 15 B (2) of the Act.

THIS was a reference made by G. D. Madgavkar, District Judge of Ahmednagar, under Order XLVI, Rule 1 of the Civil Procedure Code (Act V of 1908).

The reference was in the following terms :—

The plaintiff mortgagee in suit No. 1060 of 1910 upon his mortgage obtained a decree in terms of the compromise in Court against the defendant mortgagor agriculturist *declaring the amount due and* ordering its payment by instalments. The decree went on: "In default of payment of any instalment the plaintiff is at liberty to apply under section 15B of the Dekkhan Agriculturists Relief Act to recover the amount by sale of the property."

Two instalments were unpaid. The decree holder applied to recover the amount by sale of the property. The Court held that No order for sale had been obtained beforehand as enjoined by the decree and dismissed the *darkhast*, an order against which the decree holder applies in revision to this Court. The matter has been argued by the Government Pleader for the appellant and by Mr. Saptrishi *amicus curiæ* on the other side, the opponent being absent.

The order in question is somewhat brief, but I gather from the arguments that the learned Subordinate Judge held that the decree holder should have applied to make the decree in question final as in the case of ordinary decrees for sale under the provision of Order XXXIV, Rule 5 of the Code of Civil Procedure. The present decree very nearly though not quite follows the wording of the decree of the High Court in *Pandharinath* v. *Shankar* (1903 8 Bom. L. R. 483) which has been closely followed since as to its wording by the Courts in the Presidency in decrees for redemption, foreclosure and sale in suits of the description mentioned in section 3, clause (*y*) or ( ) of the Dekkhan Agriculturists Relief Act.

The question briefly is therefore, whether a decree holder for sale upon a mortgage in default of payment of instalments ordered under section 15 B (1) of the Dekkhan Agriculturists Relief Act must apply under Order XXXIV, Rule 5 (2) to make the decree final before he can apply for sale of the necessary portion of the property under section 15B (2) of the Dekkhan Agriculturists Relief Act.

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As pointed out by Parsons Ag C J in *Bhagwan* v *Ganu* (1899 I L R 23 Bom 644 at p 651) There is no particular magic in the word 'absolute' " but the question derives its importance legal and practical from the final opportunity provided to the mortgagor to redeem and to avoid a sale The answer depends in my opinion upon how far if at all the procedure and the provisions of Order XXXIV Rules 4 and 5 of the Code of Civil Procedure are inconsistent within the meaning of section 74 of the Dekkhan Agriculturists Relief Act with the provisions of section 15B of the Dekkhan Agriculturists Relief Act

The question has not as far as I am aware formed the subject of judicial decision by the High Court though in the case of *Bhagwan* v *Ganu* (1899 I L R 23 Bom 644 652) it was held that agreements filed under section 44 of the Dekkhan Agriculturists Relief Act if relating to sale of mortgaged property were subject to the provisions of section 89 of the Transfer of Property Act (IV of 1882) which has been now replaced by Order XXXIV Rule 5 of the Code of Civil Procedure 1908 Ranade J observed in *Bhagwan* v *Ganu* (1899 I L R 23 Bom 644 652) Of course where as in sections 15A and 15B the Dekkhan Agriculturists Relief Act contains provisions directly inconsistent with those of the Transfer of Property Act they are saved by section 2(*a*) of Act IV of 1882 This latter observation has been referred to with approval in *Mancherji* v *Thakordas* (1907 I L R 31 Bom 120 124) by Russell Ag C J who held that the term 'decree in section 15B of the Dekkhan Agriculturists Relief Act refers to decree *nisi* as well as to 'decree absolute or to adopt the altered phraseology preliminary' as well as final decrees for sale

There does not appear in the wording of section 15B clause (2) any necessary and complete inconsistency with Order XXXIV Rule 5 clause (2) On the contrary the consideration set forth by Beaman J in the last case *Mancherji* v *Thakordas* (1907 I L R 31 Bom 120 124) favour if anything a construction that the legislature in the absence of express words to that effect in section 15B (2) of the Dekkhan Agriculturists Relief Act can hardly be taken to have intended to take away with the one hand from agriculturist mortgagee judgment debtors the final opportunity the ordinary law allows under Order XXXIV Rule 5 (2) to non agriculturist mortgagor judgment debtors of finding the decretal amount and preventing the sale even of a portion of the property merely because it has with the other hand granted to the former the benefit of instalments under section 15 clause (1)

Reading the sections together and upon a consideration of the decisions above and after giving due weight to the *dictum* perhaps an *obiter dictum* of Ranade J cited above the answer to the question propounded would in my opinion be in the affirmative viz that before the Court orders the sale of

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a portion of the property under section 15B (2) of the Dekkhan Agriculturists Relief Act it must under Order XXXIV Rule 5 (2) of the Code of Civil Procedure on application made in that behalf by the plaintiff pass a final decree for sale The Code however contemplates but one such application by the plaintiff and one such final opportunity to the defendant and the law need not be strained to require second and further applications upon second and further default of instalments With this proviso the order of the learned First Class Subordinate Judge appears to me to be in law correct

The reference was heard

W B Pradhan (*amicus curiæ*), for the plaintiff — Ordinarily the creditor need not apply under section 15B of the Dekkhan Agriculturists Relief Act, in default of payment of instalments Under the old law relating to mortgage decrees there was no distinction between a preliminary and a final decree The step taken next after the passing of a decree was termed "order absolute But under the Civil Procedure Code, Order XXXIV, Rule 5, this process is described as "passing a decree ' There is no corresponding change in *the wording of section 15B of the Dekkhan Agriculturists* Relief Act The section has been held to apply to decrees, a construction which the Legislature is presumed to know see *Jogendra Chandra Roy v Shyam Das* [1]

The decree in the present case is in terms of a compromise between the parties The rights and liabilities of the parties are determined by the terms of the compromise see *Shivayagappa* v *Govindappa* [2]

A G Desai (*amicus curiæ*), for the defendants — Order XXXIV, Rule 5, clause 2, is not inconsistent with section 15 B, clause 2 of the Dekkhan Agriculturists' Relief Act Reading them together it is clear that a judgment debtor must first apply to get his decree

[1] (1909) 36 Cal 543 [2] (1913) 37 Bom 614

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made absolute before he can apply under section 15B, clause 2 The word "decree" in section 15B means a decree *nisi*

BATCHELOR, J —We are obliged to the learned pleaders who, as *amici curiæ*, have assisted us with their arguments in this case

This is a reference under Order XLVI, Rule 1, from the learned District Judge of Ahmednagar, and the question, which is propounded to this Court, is in the learned Judge's words this, whether a decree holder for sale upon a mortgage, in default of payment of instalments ordered under section 15B (1) of the Dekkhan Agriculturists' Relief Act, must apply under Order XXXIV, Rule 5 (2) of the Civil Procedure Code to make the decree final before he can apply for sale of the necessary portion of the property under section 15B (2) of the Dekkhan Agriculturists' Relief Act

In my opinion the answer should be in the negative

It is true that by section 74 of the Dekkhan Agriculturists Relief Act it is provided that, except in so far as the Civil Procedure Code is inconsistent with that Act, the Code shall apply in all suits and proceedings before Subordinate Judges under that Act But, as it seems to me, the kinds of procedure laid down by the Civil Procedure Code and the Dekkhan Agriculturists' Relief Act respectively, in the matter of sales in mortgage suits are inconsistent one with the other By Rules 4 and 5 of Order XXXIV of the Code a plaintiff mortgagee must obtain both a preliminary decree for sale and upon his separate application a final decree for sale before the mortgaged property or sufficient part thereof can be sold But sub sections 1 and 2 of section 15B of the Dekkhan Agriculturists Relief Act, which provide for the sale of mortgaged property under that Act, contain, as I read them,

materially different provisions. Sub-section 1 of the section empowers the Court in its discretion in making a decree for sale, to direct that the amount payable by the mortgagor under the decree shall be payable in instalments and sub-section 2 which is the important provision, is in these words:

> If a sum payable under any such direction is not paid when due the Court shall, except for reasons to be recorded by it in writing, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

It is necessary to contend on behalf of the judgment-debtor, and accordingly it has been contended, that the words which I have read mean no more than that the Court shall make a decree directing that in default of payment of the instalment the mortgaged property or a sufficient part thereof shall be sold. But the words which I have cited do not say that; they say a great deal more than that and, as I think, must be taken to mean what they say, that is, that the Court shall make an out-and-out order for sale; nor is there anything in the Dekkhan Agriculturists' Relief Act to suggest that anything more than this order is required for the purpose of bringing the property to actual sale.

Although as Mr. Desai has urged, the general scheme of the Dekkhan Agriculturists' Relief Act is to assist or favour the indebted defendant, I can see nothing repugnant in the construction which I have put upon the words of section 15B. For, the scheme of this section making special allowance for instalments and requiring that only a portion of the mortgaged property shall be sold, seems to me to differ entirely from the general scheme of Order XXXIV of the Civil Procedure Code. Under the Dekkhan Agriculturists' Relief Act the mortgagor is favoured in these two respects, that he is enabled to make easy payments and that only a sufficient portion of his property is sold on

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made absolute before he can apply under section 15B, clause 2 The word "decree" in section 15B means a decree *nisi*

BATCHELOR, J —We are obliged to the learned pleaders who, as *amici curiæ*, have assisted us with their arguments in this case

This is a reference under Order XLVI, Rule 1 from the learned District Judge of Ahmednagar, and the question, which is propounded to this Court, is in the learned Judge's words this, whether a decree holder for sale upon a mortgage, in default of payment of instalments ordered under section 15B (1) of the Dekkhan Agriculturists Relief Act, must apply under Order XXXIV, Rule 5 (2) of the Civil Procedure Code to make the decree final before he can apply for sale of the necessary portion of the property under section 15B (2) of the Dekkhan Agriculturists' Relief Act

In my opinion the answer should be in the negative

It is true that by section 74 of the Dekkhan Agriculturists Relief Act it is provided that, except in so far as the Civil Procedure Code is inconsistent with that Act, the Code shall apply in all suits and proceedings before Subordinate Judges under that Act But, as it seems to me, the kinds of procedure laid down by the Civil Procedure Code and the Dekkhan Agriculturists' Relief Act respectively, in the matter of sales in mortgage suits are inconsistent one with the other By Rules 4 and 5 of Order XXXIV of the Code a plaintiff mortgagee must obtain both a preliminary decree for sale and upon his separate application a final decree for sale before the mortgaged property or sufficient part thereof can be sold But sub-sections 1 and 2 of section 15B of the Dekkhan Agriculturists Relief Act which provide for the sale of mortgaged property under that Act, contain, as I read them,

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sal and contended that he had paid to N portion of the purchase money agreed upon and the balance was to be paid after the sale deed was passed. Both the lower Courts allowed the plaintiff's claim for possession though it was found that the plaintiff had notice of the defendant's contract of sale and that nearly half the purchase money was in fact received by N from the defendant under the contract. The defendant having appealed

Held that the plaintiff having purchased with notice of the defendant's contract his suit for possession must fail. He stood in the position of a trustee for the defendant of the land purchased by him and could not profit by his conveyance except to stand in the shoes of his vendor and receive the balance of the purchase money due on payment of which he would have to convey to the defendant

Lalchand v. *Lakshman*[1] and *Kurri Veerareddi* v. *Kurri Bapireddi*[2] doubted

SECOND appeal against the decision of K H Kulkne, First Class Subordinate Judge A P of Nasik confirming the decree passed by S A Gupte, Subordinate Judge at Malegaon

Suit for declaration and possession

The plaintiff sued for a declaration that the immoveable property situate at Bholegaon belonged to him and for possession of the same from the defendant He alleged that he purchased the plaint property from Narayan Ganpati for Rs 1,000 on the 5th December 1911 by a registered sale deed, that the said Narayan had leased the property to the defendant under an oral agreement for one year in 1904, and that since then the defendant continued to be in possession illegally

The defendant contended that prior to the plaintiff's purchase he had entered into an agreement with Narayan for the purchase of the plaint property for Rs 410 that under the said agreement he had already paid Narayan Rs 275 and the balance of Rs 135 was to be paid after the sale deed was passed that the

(1) (1904) 28 Bom 466 (2) (1906) 29 Mad 336

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plaintiff knew of the above fact and that his sale deed was fraudulent and without consideration

The first Court awarded the plaintiff's claim for possession although it held that the defendant's agreement to purchase the property from Narayan was proved, that he had paid part of the purchase money to Narayan and that the plaintiff purchased the property with full notice of the defendant's equities.

The lower appellate Court confirmed the decree

The defendant appealed to the High Court

K H Kelkar, for the appellant —Both the lower Courts find that the plaintiff had notice at the time of his purchase of my contract of sale, further I am in possession of the property The plaintiff has, therefore to prove superior title as against me, even in the absence of a registered deed in my favour my possession ought to be protected The plaintiff-respondent is merely a trustee for me I rely on *Kavalia Nanubhai v Mansukhram*[1], section 40 of the Transfer of Property Act section 91 of the Indian Trusts Act, and section 3 of the Specific Relief Act

W B Pradhan, for the respondent —We say that the decree of the lower Court is correct Section 54 of the Transfer of Property Act is peremptory and there is no transfer of property in favour of the defendant as there is no registered conveyance in his favour see *Immudipattam Thirugnana Kondama Naik v Periya Dorasami*[2] *Kunni Veerareddi v Kunni Bapureddi*[3] and *Timangouda v Benepgouda*[4] The fact that the defendant is in possession makes no difference, he is only entitled to have his agreement specifically enforced against his vendor see *Mahadeo v Vasudev J*

[1] (1900) 24 Bom 400
[2] (1900) 24 Mad 377 at p 384
[3] (1906) 29 Mad 336
[4] (1915) 39 Bom 47

Kurtikar[1] and *Lalchand v. Lakshman*[2] The agreement being in respect of immoveable property will not affect a registered conveyance see *Hormasji Manekji Dadachanji v. Keshav Purshotam*[3] The case of *Karalia Nanubhai v. Mansukhram*[4] is not against us there the purchaser's title was perfected by a registered sale deed before the decision by the first Court and so the present point was not before the Court in that case

Section 40, clause (2) of the Transfer of Property Act has no application because the right, which the defendant has under his contract of sale is not "an obligation annexed to the ownership of the immoveable property It is an interest created in the ownership of the immoveable property which the defendant has a right to have it specifically enforced such a right can be created only by a writing duly registered

It is further clear that a suit for specific performance is time barred At any rate we step in the shoes of our vendor and as such ought to get the balance of the unpaid purchase money lying with the defendant

SCOTT, C J —The plaintiff sued for a declaration that a certain immoveable property belonged to him and for a decree that possession of the same should be delivered to him by the defendant He bases his title upon a purchase of the properties in question from Narayan Gunpati on the 5th of December 1911 It has been held by the lower appellate Court that prior to this date the plaintiff had notice of the execution of a contract for the sale of the same property by Narayan to the defendant The defendant contends that he has paid to Narayan a portion of the purchase money agreed upon and that the balance was to be paid after the sale

[1] (1898) 23 Bom 181
[2] (1904) 28 Bom 466
[3] (1893) 18 Bom 13
[4] (1900) 24 Bom. 400

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deed was passed It is found by the lower appellate Court that nearly half of the purchase moneys was in fact received by Narayan from the defendant under the contract of sale

The question is whether the defendant has a good defence to a suit by a purchaser from Narayan who can rely upon a registered sale deed and whether he can, notwithstanding the sale deed, retain possession of the property on the ground that the plaintiff purchased with notice of the defendant's contract

The defendant's right to enforce the benefit of the obligation of his intended vendor against the purchaser with notice is expressly affirmed by section 40 of the Transfer of Property Act, as explained by the illustration The plaintiff is, moreover, according to the Specific Relief Act, section 3, a trustee for the defendant of the land purchased by him see illustration (g) Section 91 of the Trusts Act affirms the same rule as the Specific Relief Act The Legislature has herein adopted the law applied in the cases of *Daniels* v *Davison*[1] and *Potter* v *Sanders*[2] It is not contended that in the defendant's contract any date is fixed for performance nor is there any evidence that before he learnt of the plaintiff's purchase the defendant had any notice that the vendor would refuse performance Therefore at the date of the plaintiff's suit, namely, the 16th of April 1912 a suit by the defendant against his vendor for specific performance would have been within time and if the plaintiff was at the date of suit in the position of a trustee for the defendant, the latter is clearly entitled to enforce that position up to the end of the litigation It must not be taken from the above

(1) (1809) 16 Ves 249 (2) (1846) 6 Hare 1

remarks that the defendant would be in a worse position in relation to the plaintiff, if at the date of suit his right to sue his vendor for specific performance had been barred, since he is a defendant now relying upon his possession In this connection reference may be made to *Orr v Sundra Pandia*,[1] *Krishna Menon v Kesavan*[2] and *Rangnath Sakharam v Govind Narasinv*[3]

The result is that the plaintiff cannot profit by his conveyance except to stand in the shoes of his vendor and receive the balance of the purchase money due, on payment of which he would have to convey to the defendant This, however is not the relief which he seeks, and the result is that his suit for possession must fail

This decision may appear to be inconsistent with the result arrived at in *Lalchand v Lakshman*[4] and in *Kurri Veerareddi v Kurri Bapireddi*[5] from which, if rightly decided, it would appear that the defendant would have no defence against a suit by his vendor for possession although by reason of the statutory provisions above referred to he has a complete defence against his vendor s assignee, notwithstanding that the latter has no greater knowledge than the vendor possessed

It may be necessary hereafter, when a suitable occasion arises to consider in a Full Bench whether the Transfer of Property Act necessarily involves such inconsistent positions The facts of the present case do not raise the question decided in *Lalchand v Lakshman*[4] When the question does arise for consideration the observations of the Privy Council in *Immudipattam Thirugnana Kondama Naik v Periya Dorasami*[6] and the words " of itself " in the last clause

(1) (1893) 17 Mad 255
(2) (1897) 20 Mad 305
(3) (1904) 28 Bom 639
(4) (1904) 28 Bom 466
(5) (1906) 29 Mad 336
(6) (1900) 24 Mad 377 at p 384

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of section 54 of the Transfer of Property Act to which attention was called by Sir Lawrence Jenkins in *Karalia Nanubhai v Mansukhram*(1) will doubtless be considered

Decree reversed

J G R

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

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NABIBHAI VAZIRBHAI (ORIGINAL DEFENDANT) APPELLANT v DAYABHAI AMULAKH AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS *

Execution of the decree passed by Baroda Court—Application for execution presented to Baroda Court though within time according to Baroda law still out of time according to British Indian law—Transfer of decree to British Indian Court—Execution barred by limitation

A decree was passed by the Baroda Court in 1909 The first application to execute the decree was made in 1913 it being within the time prescribed by the law in Baroda The decree was transferred to the Ahmedabad Court (British) for execution in 1915 where the judgment debtor contended that no application to execute the decree having been made within three years of its date the execution of the decree was barred

Held that the decree was incapable of execution in the Ahmedabad Court having been barred according to the British Law of Limitation which governed the case

APPLICATION under extraordinary jurisdiction against an order passed by V M Mehta, First Class Subordinate Judge at Ahmedabad

Execution proceedings

The plaintiff obtained a money decree in the Kalol Court (a Court within the Native State of Baroda) on the 11th December 1909 He first applied to execute the decree in 1913, the application having been within time allowed by the law in Baroda In 1915, the

(1) (1900) 24 Bom 400 at p 402

* Civil Extraordinary Application No 329 of 1915

decree was transferred for execution to the Ahmedabad Court (a Court within British India) The defendant contended that the plaintiff not having applied to execute the decree within the time allowed by British Indian laws the execution of the decree in the Ahmedabad Court was barred by limitation

The lower Court held that the execution of the decree was not barred following the decision at I L R 15 Bom 28

The defendant applied to the High Court

G N Thakor for the applicant —The execution of the decree is barred by limitation No application for execution having been presented in the Baroda Court within three years of the date of the decree, the decree is, so far as the British Courts are concerned barred When the execution of a foreign decree is sought in British India it is the British law of limitation that applies see *Hukum Chand Aswal v Gyanender Chunder Lahiri*,[1] *Leake v Daniel*[2] *Her Highness Ruckmaboye v Lulloobhoy Mottichund*[3] The executing Court is competent to go into the question whether a foreign decree sent to it for execution was time barred see *Leake v Daniel*[2] *Nursing Doyal v Hurryhur Saha*[4] *Chhotay Lal v Puran Mull*[5] and *Jeewandas Dhanji v Ranchoddas Chaturbhuj*[6]

M K Mehta, for the opponent —The application for execution made to the Baroda Court, having been made within the time prescribed for it by the Baroda law, must be considered to be a valid application to execute the decree The present application having been made within three years of the first application is within time even according to the British law

[1] (1887) 14 Cal 570
[2] (1868) 10 W R 10 (F B)
[3] (1852) 5 Moo I A 234
[4] (1880) 5 Cal 897
[5] (1895) 23 Cal 39
[6] (1910) 35 Bom 105

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The Baroda Court having already passed an order for execution, the British Court is bound by the same and cannot go behind it see *Husein Ahmad Kaka v Saju Mahamad Sahid* (1) Even if the order be treated as one transmitting a decree for execution, the executing Court cannot go into the question of limitation As regards British decrees, the Court to which the decree has been transmitted cannot go into the question of limitation

BATCHELOR, J —The present application is made by the judgment-debtor who was the 4th defendant in the suit The suit was filed by the plaintiffs to recover upon two documents, and the Court in which the suit was instituted was the Court of Kalol in the territories of His Highness the Gaikwar of Baroda There a decree was passed in the plaintiffs favour, and ultimately the plaintiffs applied that this decree should be transferred for execution to the Court of the Subordinate Judge of Ahmedabad That transfer was accordingly made, and the *darkhast* has been heard by the learned Subordinate Judge of the First Class

The only one of his findings with which we are now concerned is the finding that the execution of this decree is not barred by time That finding is challenged by Mr Thakor on behalf of the present applicant and it seems to me that Mr Thakor s contention must be allowed

There is some uncertainty as to what the law of limitation is in Baroda with regard to the execution of such decrees But this much is agreed between the parties that the period of limitation is either six years or twelve years Whether it is the one or the other is a matter of no moment I will assume in favour of the opponent that it is six years The decree was obtained on the 11th December 1909 Admittedly the first application made for execution was not made

till 1913 That application was, therefore, within time according to the law in Baroda It was admittedly beyond time according to the law in British India, which prescribes a period of three years for such an application Now suits and applications must be brought within the period prescribed by the local law of the country within which the suit or the application is brought, that is to say, it is the *lex fori* which governs That being so this decree became, in my opinion, incapable of execution in British India after the lapse of three years from the date the decree was made And since the law to be applied is the law of British India it is no answer to say that the decree was still alive and capable of execution in Baroda when the order was made transmitting it for execution to Ahmedabad The learned Judge has I think, misunderstood Sir Charles Sargent's decision in the case of *Husein Ahmad Kaka* v *Saju Mahamad Sahid*[1] which he has construed as authority for the proposition that he had no power to determine whether execution was barred or not, being bound by the order of the transferring Baroda Court That decision is of no authority in regard to a decree ordered for transmission by a foreign Court The very ground of the decision is that there is outstanding an order of a competent Court binding the parties and directing the execution of the decree No such order as this either was made, or could have been made by the Baroda Court so as to bind the Ahmedabad Court or the parties litigating in that Court It was therefore competent to and obligatory upon, the learned Subordinate Judge to consider and determine this question of limitation

For the reasons which I have given and which are supported by this Court's decision in *Jeewandas Dhanji* v *Ranchoddas Chaturbhuj*,[2] I am of opinion that

[1] (1890) 15 Bom 28 [2] (1910) 35 Bom. 103

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this decree was incapable of execution in the Court of Ahmedabad being barred by time according to the British law of Limitation which, in my view, governed the case Therefore I would make the rule absolute and order that the *darkhast* be dismissed against the present applicant with costs here and in the Court below

SHAH, J —I am of the same opinion The question is whether the application for execution made by the plaintiffs to the First Class Subordinate Judge's Court at Ahmedabad is in time

The decree sought to be executed is a decree of the Court at Kalol in the Baroda territory and was passed in December 1909 The application for execution was made in 1915, after the decree was transferred by the foreign Court to the British Court for execution It must be decided with reference to the law of limitation obtaining in British India, and it is clear that according to the provisions of the Indian Limitation Act, the application is beyond time Even assuming, without deciding, that the applications made for the execution of the decree to the Court at Kalol could be treated as applications to the proper Court for execution within the meaning of Article 182 of the Limitation Act, it is an admitted fact in this case that no application was made even to the Court at Kalol within three years from the date of the decree for execution The application is therefore, clearly time-barred

I think that it was competent to the lower Court to determine the point of limitation and that the order of the foreign Court transmitting the decree for execution did not and could not conclude the question The decision in *Husein Ahmad Kaka v. Saju Mahamad Sahid* [1] has no application to the present case and is

[1] (1890) 15 Bom 28

stinguishable on the grounds stated in the case of *...andas Dhanji v. Ranchoddas Chaturbhuj* [1]. It not for the foreign Court to consider whether the ecution in British India would be time barred and e order for transmission by the foreign Court cannot treated as an order for execution.

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Rule made absolute.

R. R.

APPELLATE CIVIL

Before Mr. Justice Batchelor and Mr. Justice Shah.

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February 29.

E MUNICIPALITY OF BELGAUM (ORIGINAL PLAINTIFF), APPLICANT *v.* RUDIAPPA SUBRAO SUTAI AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

...il Procedure Code (Act V of 1908), section 115—High Court—Revisional ...urisdiction—Decision of District Court—Bombay District Municipalities Act (Bombay Act III of 1901), section 160.†

No application can be made under the revisional jurisdiction of the High ...urt from the decision of a District Court under clause 3 of section 160 of ... Bombay District Municipalities Act (Bombay Act III of 1901).

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(1) (1910) 35 Bom. 103.

* Civil Extraordinary Application No. 294 of 1915.

†Section 160 of the Bombay District Municipalities Act (Bom. Act III of ...01) runs as follows:—

160. (1) If a dispute arises with respect to any compensation, damages, ...sts or expenses which are by this Act directed to be paid, the amount and if ...cessary the apportionment of the same shall be ascertained and determined ... a Panchayat of five persons, of whom two shall be appointed by the Munici...lity, two by the party (to or from whom such compensation, damages, costs ... expenses may be payable or recoverable) and one, who shall be sir panch, ...all be selected by the members already appointed as above.

(2) If either party or both parties fail to appoint members, or if ...e members fail to select a sir panch within one month from the date of ...th...r party receiving written notice from the other of claim to such compensa...on, damage, costs or expenses, such members as may be necessary to ...nstitute the Panchayat shall be appointed at the instance of either party ...y the District Judge.

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MUNICIPALITY OF BELGAUM v. RUDRAPPA

THIS was an application under section 115 of the Civil Procedure Code from the decision of N J Wadia, Assistant Judge at Belgaum

The Municipality of Belgaum having had to acquire a piece of land in the city of Belgaum, disputes arose between the Municipality and the owner (defendant No 1) as to the amount of compensation for the land, which were referred by the parties to a Panch under the provisions of clause 1 of section 160 of the Bombay District Municipalities Act (Bombay Act III of 1901) On the failure of the Panch to deliver their award within one month, the Municipality applied to the District Court under clause 3 of the section to detérmine the amount of the compensation

During the inquiry before the Assistant Judge it appeared that the house upon the land belonged to defendant No 1, while the land itself belonged to defendants Nos 2 and 3 The learned Judge held upon a preliminary issue that he had no jurisdiction to proceed with the suit without the claims of defendants Nos 2 and 3 having been first submitted to arbitration under clauses 1 and 2 of section 160 He, therefore, dismissed the suit

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(3) In the event of the Panchayat not giving a decision within one month from the date of the selection of the sir panch or of the appointment by the District Court of such members as may be necessary to constitute the Panchayat the matter shall on application by either party be determined by the District Court which shall in cases in which the compensation is claimed in respect of land follow as far as may be the procedure provided by the Land Acquisition Act 1894 for proceedings in matters referred for the determination of the Court

Provided that—

(a) no application to the Collector for a reference shall be necessary and

(b) the Court shall have full power to give and apportion the costs of all proceedings in any manner it thinks fit

The Municipality applied to the High Court

At the hearing a preliminary objection was raised, at the application did not lie

T R Desai, for respondent No 1 in support of the preliminary objection —The present proceedings were taken under section 160 of the Bombay District Municipalities Act, 1901 That section vests jurisdiction only in a District Judge, which is a personal jurisdiction It has been held that a District Judge acting under the District Municipalities Act is not a Court for the purpose of section 22 and the High Court declined to interfere in revision against his order *Balaji Sakharam v Merwanji Nowroji*[1] It is also held that no appeal lies against an order passed by a District Judge under section 160 of the Act *Chunilal Virchand v Ahmedabad Municipality*[2] If no appeal can lie, a revisional application cannot also lie The scheme of the Act is to make the District Judge's decision final

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A G Desai for the applicant —Merely because an order is not appealable it cannot be said that a revisional application does not lie There are many cases under the Civil Procedure Code, where there is no appeal yet a remedy by a revisional application is contemplated The case of *Balaji Sakharam v Merwanji Nowroji*[1] is distinguishable, for the term used in section 22 is "District Judge" whereas section 160 speaks of "District Court"

K H Kelkar for opponent No 2

BATCHELOR, J —In the case of *Chunilal Virchand v Ahmedabad Municipality*[2] it has been decided by a Bench of this Court that no appeal lies from the decision of a District Court under clause (3) of section 160

[1] (1895) 21 Bom 279 [2] (1911) 36 Bom 47

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of the Bombay District Municipalities Act The object of this application is to obtain from the Court a decision that although no appeal would lie, yet an application in revision does lie Such a decision would, in our opinion, be seriously anomalous, and we do not think that the words of the Statute require us to make such a pronouncement The only decision which seems to us fairly consistent with that already recorded in *Chunilal Virchand s case*,[1] is the decision that no application for revision is competent In *Balaji Sakharam v Merwanji Nowroji* [2] this Court has held that it has no jurisdiction to revise the order of a District Judge acting under section 23 of the Bombay District Municipalities Act of 1884 And although the words occurring in that section are 'District Judge,' whereas the words occurring in section 160, last clause, are 'District Court,' we do not think that the distinction is sufficient to support the argument that an application for revision is competent, although admittedly no appeal would lie

The rule, therefore, must, in our opinion, be discharged with costs

There will be one set of costs

We notice that the order in this case was made not by the District Judge but by the Assistant Judge As however, no point has been taken on this circumstance it is unnecessary for us to decide—and, therefore, we do not decide—whether the District Judge was competent under section 16 of the Civil Courts' Act or otherwise to transfer to the Assistant Judge this particular case

Rule discharged

R R

[1] (1911) 36 Bom 47 [2] (1895) 21 Bom 279

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

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March 6

GURAPPA SHIVGINAPPA PUTTI (ORIGINAL PETITIONER) APPELLANT *v* TAYAWA SHIDDAPPA KALASANNAVAR AND OTHERS (ORIGINAL OPPONENTS) RESPONDENTS °

Guardian and Wards Act (VIII of 1890) section 7—Application for guardianship of property—Resistance to the guardianship order on the ground that the property was joint family property—Elaborate inquiries into the character of the property not competent—Summary nature of the inquiry

In an application for guardianship of a minor property under section 7 of the Guardians and Wards Act (VIII of 1890) the applicant alleged that the property was the separate property of the minor s husband The opponents resisted the application contending that the property was joint family property which had survived to them The Court conducted a lengthy inquiry into the character of the property and having come to the conclusion that it was joint rejected the application The applicant having appealed

Held reversing the order inasmuch as the application was made on the footing and with the claim that the minor was separately entitled to separate property the Court ought to appoint a guardian of the property of the minor and leave it to him to institute suits for the recovery of the property

Section 7 of the Guardians and Wards Act (VIII of 1890) contemplates only a summary enquiry followed by an order made for the welfare of the minor

APPEAL from the decision of N J Wadia, Assistant Judge of Belgaum

This was an application under section 7 of the Guardians and Wards Act (VIII of 1890)

The applicant applied for an order appointing him guardian of the person of his minor daughter S[illegible], and the Collector or the Nazir of the Court as [illegible] of her property

The property in dispute belonged originally [illegible] Shidappa, on whose death, it passed to his son, [illegible]

° First Appeal No 31 of 1915

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(husband of Savitribai) Baswanta having died, the present proceedings came up The applicant alleged that the property being the separate property of Shidappa and Baswanta, the minor Savitribai was entitled to it The opponents, who were the two widows of Shidappa and the two brothers of Shidappa, opposed the application contending that the property in dispute was held by Shidappa jointly with his two brothers, and that on his death, it passed to them by survivorship

The Assistant Judge went into the question whether the property was joint ancestral or separate, and having come to the conclusion that it was joint ancestral, rejected the application for appointment of guardian to the property

The applicant appealed to the High Court

Jayakar, with *Nilkanth Atmaram*, for the appellant, referred to *Virupakshappa* v *Nilgangava* [1]

Coyaji with *A G Desai* for the respondents Nos 1, 3 and 5

BATCHELOR, J —This is an appeal from a judgment of the learned Assistant Judge of Belgaum pronounced in an application made under section 7 of the Guardians and Wards Act The application was by the present appellant who is the father of the minor concerned a young widow named Savitribai, aged about 16 or 17 The application was that the appellant should be appointed guardian of her person and property

The petition was made on the footing that certain property left on the death of the widow s husband s father, named Shidappa, was Shidappa's separate property The opponents contended on the other hand, that this property was joint property between Shidappa

[1] (1894) 19 Bom 309

and his brother. The question therefore was raised in the lower Court whether the property was in fact the separate property of Shidappa or was joint family property, and the learned Judge below embarked upon a long and laborious enquiry upon this question. In the end he came to the conclusion adverse to the petitioner, holding that the property was joint. Consequently he refused to appoint petitioner guardian of the property.

In appealing against this decision counsel for the petitioner seeks to show that on the evidence the true conclusion should be that the property was separately owned by Shidappa. It appears to me however that there is an initial difficulty in the appellant's way, and that is that in my opinion elaborate enquiries of this nature are not contemplated to be made under section 7 of the Guardians and Wards Act. That section in my judgment contemplates only a summary enquiry followed by an order made for the welfare of the minor. Another reason for holding that such an enquiry as this is outside the scope of the Guardians and Wards Act is that, despite the elaborateness of the enquiry made, it is admitted that the Court's decision, whatever it might be, would not operate as *res judicata*, so that the difficult questions agitated in such an enquiry as this would still have to be agitated again in a civil suit in order that finality of decision could be attained.

Mr. Jayakar for the appellant has called our attention to the Full Bench decision in *Virupakshappa* v. *Nilgangava*.[1] But that case is not, I apprehend, of authority upon our present facts. For the facts upon which that case was decided were that the minor in question was admittedly a member of a joint Hindu family governed by the Mitakshara law, and, therefore,

[1] (1894) 19 Bom. 309.

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admittedly possessed of no separate property Here it is otherwise For the petitioner claims that the minor is not a member of a joint Hindu family and is entitled in her own right to the separate property owned exclusively by Shidappa It is true that this position is contested on behalf of the opponents But the question between them must, I think, be decided by a civil suit and ought not to be determined in summary proceedings under the Guardians and Wards Act For the purposes of that Act it is, I think, enough that the petition is made on the footing and with the claim that the minor is separately entitled to separate property Upon that footing, I think, we ought to appoint the petitioner the guardian of the property of the minor It will then be for him on behalf of the infant to institute suits for the recovery of the property which he claims

I would, therefore, reverse the finding and the order of the learned *Assistant Judge* and appoint the petitioner guardian of the minor s property without expressing any opinion as to whether the petitioner is right in claiming that the property belonged to Shidappa separately, or the opponents are right in maintaining the contrary

We have not overlooked that passage in the petition where the petitioner expresses his willingness that the Nazir may be appointed guardian of the property But on the whole it appears to us more satisfactory that the petitioner himself should be appointed *in that capacity*

No costs here or in the Court below

SHAH, J —I am of the same opinion

Order reversed

R R

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

MUKUNCHAND RAJARAM BALLA (PLAINTIFF) *v.* NIHALCHAND GULMUKHRAI (DEFENDANT).* 1915 July 2.

The Indian Contract Act (IX of 1872), section 47—Sale and purchase of cotton goods—Forward contract—March delivery—Contract not to be cancelled on any account—Contract governed by the Rules of the Bombay Cotton Trade Association—Rule 17 of the Bombay Cotton Trade Association—Vendor bound to tender goods without demand from the purchaser—Railway receipt not a delivery order—Vendor committing a breach cannot sue in damages—Vendor not mulcted in costs, breach being technical.

By a contract dated the 2[illegible]th January 1914 the defendant agreed to purchase from the plaintiff 200 bales of cotton—March delivery between the 15th and the 25th. The contract was expressed to be in all details governed by the Rules of the Bombay Cotton Trade Association subject to the exception that it was not to be cancelled on any account. Under Rule 17 of the Rules of the Bombay Cotton Trade Association the vendor was bound to tender a delivery order backed by the goods before 1 P. M. of due date. In the event of his failure to do so the buyer had three courses open to him: (1) to cancel the contract, (2) to buy at seller's risk and (3) to close at the room rate of the day. On the 19th March 1914 the plaintiff handed over to the defendant a railway receipt for 100 bales. On the 25th March 1914 the defendant applied to the railway authorities for delivery of the goods and failing to get the same returned the railway receipt the next day to the plaintiff informing him that by reason of non-performance on the plaintiff's part the contract had been cancelled by the defendant. The plaintiff relying upon the clause of the contract precluding either party from cancelling the same in any event claimed the sum of Rs. 2,[illegible]79-13-0 the difference between the contract price and the market price in respect of 100 bales. The plaintiff further contended that giving a railway receipt was tantamount to giving possession of the goods and that inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17 of the Bombay Cotton Trade Association.

Held, (1) that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date and that if he failed

* O. C. J. Suit No. 1251 of 1914.

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to do so he would not be absolved from the obligation of tendering the delivery order backed by the goods according to the contract

(2) the plaintiff having shown himself to be in the breach could not approach the Court and sue for damages on the contract

Vanmali Hargovind v. Tarachand Ganeshamdas [1] referred to

THE plaintiff and the defendant were shroffs merchants and commission agents, doing business in Bombay By a contract in writing dated the 25th January 1914, the plaintiff sold to the defendant 200 bales of Bengal Fully Good Cotton deliverable from the 15th to the 25th of March 1914 at the rate of Rs 223-4-0 per candy The contract provided that the same was not to be cancelled on account of any cause and that it was made according to the rules and regulations of the Bombay Cotton Trade Association

The contract of purchase ran as follows —

To WIT —We have bought from you 200 fully pressed bales (i e two hundred) Bengal Fully good new crop of Sumvat 1970 The rate thereof is Rs 223 4 0 in figures two hundred and twenty three four annas per candy Rebate at 5¼ per cent to be allowed The time for delivery is from 15th March to 25th March 1914 The contract cannot be cancelled on account of any cause (The contract is made) according to the rules and regulations of Bombay Cotton (Trade) Association We would take delivery on condition of the 100 bales measuring 26 tons

Brokerage ½ per cent to be paid by the vendor

Rule 17 of the Bombay Cotton Trade Association *inter alia* provided as follows —

All cotton contracted for for forward delivery shall be ready and delivery order for the same (as provided in Rule 15) shall be tendered by 1 p m (standard time) on the latest day for delivery specified in the contract In case a delivery order for the cotton or any portion of it is not so tendered or in case the cotton or any portion of it for which a delivery order has been passed is not actually then ready in Colaba or Jatha or in the godown for delivery the buyer may (1) cancel the contract or (2) buy in the market on the same day at a reasonable rate on account and at the risk and expense of the seller or (3) claim damages at the market rate of the day vide Rule [illegible]

[1] (1891) Chitty and Patell collection of cases of the Bombay Small Causes Court p 305

provided always that in the event of the buyer exercising the option of buying in the market and there being any dispute as to the reasonableness or otherwise of the price paid by him such dispute shall be referred to arbitration as provided by Rule 13. If on the other hand the seller has tendered the cotton within the time specified in the contract as provided for above and if the buyer neglects or refuses to either approve of or have arbitration held on the cotton so tendered as provided in Rule 18 hereafter the seller after giving 48 hours notice to weigh after the expiration of the time allowed by arbitration has the option of either selling the goods at the risk and expense of buyer or claiming damages at the market rate of the day.

On the 19th of March 1914 the plaintiff handed over to the defendant a railway receipt in respect of 100 bales of cotton consigned from up country. On and prior to the 25th of March 1914 the defendant applied to the railway authorities for the delivery of the bales, and the defendant not getting the same instructed his attorneys to write on the 26th March 1914 as follows:—

Our client says that he applied for delivery to the railway authorities yesterday but he was not able to obtain delivery thereof. We are therefore instructed to return you the said railway receipt and to inform you that by reason of the non performance on your part of the contract the same has been cancelled by our client.

The plaintiff's attorneys sent the following reply, on the same day:—

Our client tendered to yours the railway receipt in respect of the contract mentioned in your letter and that your client is not entitled to cancel the contract. Your client is aware that the contract contains a term that the same is not to be cancelled under any circumstances. Your client cannot therefore cancel the contract. Our client closes the said contract at the rate declared by the Bombay Cotton Trade Association yesterday and will send in their bill in due course. Without prejudice however to the above our client states that if your client had informed ours as soon he applied for delivery and was unable to obtain the same our client would have at once delivered the bales to your client at the Colaba Cotton Green.

The defendant's attorneys replied on the 28th of March as follows:—

Our client denies your client's alleged right to close the contract after receipt of our letter cancelling the same. Our client's duty was to wait for

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delivery till the last month Your clients chose to tender railway receipt in performance of the contract and the goods were not delivered and there remained no further obligations upon our client as attempted to be fastened by your letter under reply Our client denies his liability to pay difference according to the alleged closing

The plaintiff thereupon sued to recover the sum of Rs 2,279-13-0, being the difference between the contract price and the market price for 100 bales, alleging that the defendant was not entitled to cancel the contract and that the plaintiff was justified according to the rules of the Bombay Cotton Trade Association, in closing the same at the rate declared on the 25th of March 1914 The plaintiff further alleged that giving a railway receipt was tantamount to giving possession of the goods, and that inasmuch as the *defendant* had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17

The defendant denied that the railway receipt was handed over in part performance of the contract or that he thereby waived his right to require a delivery order or delivery of actual goods as provided by the rules of the Bombay Cotton Trade Association The defendant said that the railway receipts are usually handed over for the sake of convenience of the vendors, and that if the goods do not arrive before the due date the receipts are invariably returned to the vendors The defendant contended that under the circumstances aforesaid he was entitled to cancel the said contract

The contract as to the remaining 100 bales of cotton was settled between the parties before the due date, by the defendant paying Rs 2,279-13-0 to the plaintiff

Wadia and *Mehta* for the plaintiff

Setalvad and *Desai* for the defendant.

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BEAMAN, J —This case has been brought, as counsel stated, by way of a test case The point upon which I understood, at first that it was meant to be a test case was, whether the contract between the parties was to be read as containing a clause precluding either of them from cancelling the contract in any event, and, if so, whether that was a good agreement As the case developed it appeared as though the decision of the Court were required upon another point namely, whether the plaintiff by giving the rukwa receipt on the 19th of March 1914 had thereby complied with the condition of the contract made between the parties requiring tender by the vendor The contract is a cotton contract entered into on the 25th of January 1914 for the purchase by the defendant from the plaintiff of 200 bales of cotton—March delivery—between the 15th and 25th, and expressed to be in all details, governed by the Rules of the Bombay Cotton Trade Association, subject only to this exception that in no circumstances was the contract to be cancelled I have no doubt whatever, notwithstanding the fact that for want of punctuation a different construction has been sought to be placed by the defendant upon the term, that the contract was meant and was expressed to be irrevocable A very cursory study of the Rules of the Bombay Cotton Trade Association will show why a term of this sort is introduced into almost all cotton contracts between reputable dealers If we turn to Rule 17 of the Rules of the Bombay Cotton Trade Association, we shall find that under a contract of this kind the vendor is bound to tender a delivery order backed by the goods before 1 P M of due date That will be on this occasion before 1 P M of the 25th of March 1914 In the event of his failure to do so, the buyer has three courses open to him (1) to cancel the contract (2) to buy at seller's risk, and (3) to close at the room-rate of the day The first of these three courses,

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if left open, would practically put a *stop to* all *cotton* business in Bombay That is the reason why all these contracts will be found, I believe, certainly the English contracts, to have a clause similar *to the* clause *in this* contract stipulating that in no circumstances is the contract to be cancelled What, then, is the result if the seller does not tender a delivery order for the goods in due course? The buyer *may* buy at seller's risk paying the difference if the market has fallen, or he may choose simply to close the contract without taking the goods by paying differences If the seller refuses or negligently omits to tender, it is obvious that in a falling market the buyer stands in no need of any remedy whatever The provisions of Rule 17, *which* have the appearance of being optional, must, therefore, be understood, if business is to go on at all, as being imperative upon the other party to the contract Very unfortunately, expert evidence which *might* have been available to the Court on the custom of the trade, particularly with reference to the substitution of railway receipts for delivery orders, was objected to by the defendant, and consequently I have not that material on the record which would enable me to give chapter and verse upon the highest authority for the proposition I am now stating as being a proposition generally true, applicable to, and governing the cotton *trade* in this city There can, I apprehend, be absolutely no doubt that between large firms thousands of deals are entered into under the Rules of the Bombay Cotton Trade Association, every contract including a term that the contract shall not be cancelled in any circumstances, and that the parties thereto settle under Rule 17 in the manner I have described, that is to say, it would be the understanding between honest dealers that the party against whom the market had turned would, whether delivery were tendered or not, conclude the contract in the manner made optional to him by

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Rule 17. He could not cancel the contract but he would be obliged if he were an honest dealer, either to buy at the risk of his vendor and send him a difference note stating the rates at which he bought and at which he had agreed to buy from the vendor, and pay the difference or he would adopt the simpler course of merely invoicing the goods back to the vendor at the market rate of the day, again paying the difference. It is perfectly clear that if the contracts were allowed to be cancelled merely for non-tender of goods or delivery order as is actually provided for in Rule 17, a great part of the cotton business done on a large scale by the principal firms here would be paralysed. On the other hand, it is equally clear that the insertion of such a clause in the contracts indicates that they are essentially what the Courts would call wagering contracts and, therefore, there might be some difficulty in enforcing them in a Court of law. Doubtless, it is also for this reason that so little stress is laid upon the *tender of the delivery order*: for the *non-tender of* the delivery order for all the purposes which the framers of the Rules had in view, could make no substantial difference to the losses or gains of the parties once they had contracted themselves out of the liberty allowed to the party not in breach to cancel the contract. So that I do not doubt that in practice very little importance is *attached to the actual tender of* delivery orders or of goods where the contracts have been made rather for cover than with the object of actually obtaining goods it being then the well-understood practice of the market that the loser on such contracts will follow out the intentions of the framers of the Rules whether delivery was tendered or not by adopting one or other *of the two courses laid* down in Rule 17. The third course, *viz.* the cancellation of the contract, must, I repeat, be kept out of view altogether.

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Now, in a case like the present, the defendant is "bulling" the market, and accordingly on the settling day, the fall having been very heavy, stands to lose a considerable sum to the plaintiff. The plaintiff has goods in his possession and nothing could have been easier for him than to tender a delivery order backed by goods to the buyer. And what was puzzling me throughout the earlier part of the case was how a business man could be so utterly foolish as to neglect a natural precaution of that kind, which would have protected him against all the legal difficulties that have proved so insurmountable here. It was only when I came to read Rule 17 much more carefully that I realised that between honest dealers the tender or non tender of delivery really made no difference whatever. If the other party to the contract, whether delivery was tendered or not, is equally bound, as though upon a breach, to carry out the contract in one of the two ways I have mentioned and is prohibited from cancelling it, it becomes at once clear that nothing really turns upon the tender. Let us suppose that the buyer in a falling market really desired to get the goods he had bought. He cannot seriously pretend that he is damnified in any way by the plaintiff not tendering. All he has to do is to buy the goods in the market where he would get them at a much lower rate than that he was to pay the plaintiff. It is obviously, therefore, fallacious and hypocritical on the part of the defendant here to pretend that there has been a substantial breach of the contract on the plaintiff's part. Technically, no doubt there has been and that is the plaintiff's great misfortune. As the defendant had settled honestly in respect of half of the contract the plaintiff might very reasonably have anticipated that he was an honest man who would settle up in respect of the other half. I cannot find that any tender was made of the 100 bales

for which the defendant has paid differences, virtually invoicing them back to the plaintiff at the difference between the purchase rate and the rate of the day and that is of course what he ought to have done in respect of the 100 bales now in dispute, and would have done if he had been acting in the spirit as well as the letter of the Rules of the Bombay Cotton Trade Association For what appeared to me little short of insanity in a business man namely after having goods in his hands which he only had to tender in order to ensure great pecuniary gain he should not have made such a tender becomes perfectly intelligible as soon as one realises that non-delivery never involves the cancellation of the contract and really leaves the parties practically where they were for settlement at the rate of the day on the day fixed for the performance of the contract That too explains the class of cases upon which a reference was made by Mr Hart, when Chief Judge of the Small Causes Court here to Sir Charles Sargent and Farran J see *Vanmali Hargovind v Tarachand Ganeshamdas*[1] Unfortunately, however this practice does not take into account the provisions of section 47 of the Indian Contract Act And the answer given to the reference made by Mr Hart establishes the simple proposition that any party shown to be in breach cannot approach the Court as a plaintiff in a suit for damages on the contract That is the unfortunate position of the plaintiff here Technically he is undoubtedly in breach inasmuch as he did not go through the form of tendering the delivery order, backed by the goods, to the defendant at his place of business at Kalbadevi before 1 p m of the 25th of March Doubtless realising the difficulty thus placed in his way, the plaintiff sought to overcome it by pleading that he had given

[1] (1891) Chitty and Patell Collection of cases of the Bombay Small Causes Court p 305

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the defendant the railway receipt for 100 bales of cotton on the 19th of March 1914 He contended that giving a railway receipt was tantamount to giving possession of the goods, and that, inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date, he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17 That contention, I am afraid, cannot be sustained In dealing with Bengal cotton (and the contract here is for Bengal cotton), no doubt, if evidence had been called it would have been found that there is a custom peculiar to this branch of the trade and that that custom gives more importance to railway receipts than could be given under a contract in common form such as I have to consider In every contract intended to be governed by that custom of the trade, I understand that the letters "R T" (Railway Terms) ought to be inserted If I found those terms in this contract, then it would have been open to the Court to invite the opinion of persons conversant with the trade to explain what the meaning of the terms was But there is nothing in this contract apart from the quality of the goods, to suggest that it differs in any respect from any other contracts made under the rules of the Bombay Cotton Trade Association Now, doubtless, a person giving a railway receipt for goods which he is bound to deliver before due date ordinarily does so with the object of making a partial realisation of the price It is in evidence here though the evidence is not so clear as could be wished that the party tendering the railway receipt ordinarily expects 90 per cent cash in advance But it would still lie on the person bound to make a tender under *Rule 17* to satisfy himself that the goods covered by the railway receipt had actually arrived in time No obligation of that sort appears to be cast upon the takers of the

railway receipt who thereon advance 90 per cent of the invoice value of the goods I suppose this practice of giving railway receipts instead of delivery orders is adopted merely in order to secure the advance payment of 90 per cent of the price, and is not understood in the trade to absolve the vendor from any of his obligations as laid down in Rules 15 and 17 As to that I entertain no doubt whatever It could not I think, be otherwise On a first view it may seem hard upon a vendor who has given a railway receipt for the goods which, in ordinary course should arrive long before due date that his vendee should hold the railway receipt and not inform him that the goods had not arrived so that he might in the belief that they had, neglect to tender the delivery order backed by the goods before 1 P M on due date I am assuming here that the defendant did not inform the plaintiff that the goods covered by the railway receipt had not arrived That is putting the position at the very highest in favour of the plaintiff But even so, having regard to the practice of advancing 90 per cent on the railway receipt, I should still be of opinion that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date, and that if he failed to do so he would not be absolved from the obligation of tendering the delivery order backed by the goods according to his contract

This being my view of the legal relations existing between the parties the case appears to be one in the eye of the law of extreme simplicity, falling within section 47 of the Indian Contract Act Under that section, there was a specified time before which the plaintiff agreed to tender the goods sold When I first read Rule 17, I thought perhaps that the word 'tender' had been loosely used by the framers of those rules without the intention of giving it its ordinary sense or

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making it mean more than the wider word 'give' If the word had been 'give' instead of 'tender,' then, no doubt, it would have been an open question whether in the facts disclosed here it was for the defendant to ask for the goods or for the plaintiff to offer them On a reconsideration of the rule, however, I can entertain no doubt but that the framers meant the word 'tender' to have its full legal connotation for, if he wishes to be on the safe side the vendor is bound to tender without any demand being made by the purchaser, and if he fails to do so, although should he be dealing with an honest buyer he is in no danger of incurring any loss, yet if he is dealing with a dishonest buyer, as in the present case, he clearly precludes himself from having any access to the Courts of law He cannot come here and complain that he has been damnified by the breach of the contract made between him and the defendant when on his own admission it is he who has first broken the contract I have already explained that this is technical rather than substantial, and, according to what I believe to be the universal understanding of the market, the plaintiff, in a case like this, would have committed no fault whatever and all the dishonesty would have been on the side of the defendant But the law, in its extreme zeal to suppress gambling transactions and in its jealous desire to preserve public morality, always succeeds in my opinion, in ultimately making itself the instrument of injustice and the protector of the dishonest against the honest gambler Considering that in all mercantile operations on a large scale there must evidently be a considerable element of what the law calls wagering we find in an instructive case of this kind how hardly the legal doctrine of wagering may often press against the innocent and shield the guilty It cannot be doubted that but for the apprehension of those who

transactions must occasionally bring them very close to the domain of wagering and yet who are in every sense perfectly honest dealers, the rules of this Association would have been worded in a much more simple direct and satisfactory manner

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Being perfectly satisfied of the real merits of the case and that on the ground of morality all those merits are on the side of the plaintiff I shall in dismissing his suit direct that each party bear his own costs

Attorneys for the plaintiff —Messrs *Motichand and Devidas*

Attorneys for the defendant —Messrs *Tyabji, Dayabhai & Co*

Suit dismissed

G G N

ORIGINAL CIVIL

Before Mr Justice Macleod

BOGGIANO & Co (PLAINTIFFS) v THE ARAB STEAMERS Co LIMITED (DEFENDANTS) *

1915

October 21

The Indian Contract Act (IX of 1872) sections 56 65—Contract of charter party—Contract impossible of performance—Freight paid in advance—Export of goods shipped on board prohibited by Government—Claim for refund of freight—Bills of lading—Shipping orders—Common carriers—Carriers by sea—Private carriers—Carriers Act (III of 1865)—Carriers by sea excluded by the Carriers Act—Loss by way of demurrage

On the 1st April 1915 the defendant Steamer Company entered into an agreement with C & Co a firm of freight contractors whereby the latter chartered the steamer Hejaz for a voyage Bombay to Naples Genoa and/or Marseilles any two discharging ports at charterer s option Subsequently the

*O C J Suit No 966 of 1912

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making it mean more than the wider word 'give' If the word had been 'give' instead of 'tender,' then, no *doubt*, it would have been an open question whether in the facts disclosed here it was for the defendant to ask for the goods or for the plaintiff to offer them On a reconsideration of the rule, however, I *can* entertain no doubt but that the framers meant the word 'tender' to have its full legal connotation, for, if he wishes to be on the safe side the vendor is bound to tender without any demand being made by the purchaser, and if he fails to do so, although should he be dealing with an honest buyer he is in no danger of incurring any loss, yet if he is dealing with a dishonest buyer, as in the present case, he clearly precludes himself from having any access to the Courts of law He cannot come here and complain that he has been damnified by the breach of the contract made between him and the defendant when on his own admission it is he who has first broken the *contract* I have already explained that this is technical rather than substantial, and according to what I believe to be the universal understanding of the market, the plaintiff, in a case like this, would have committed no fault whatever and all the dishonesty would have been on the side of the defendant But the law, in its extreme zeal to suppress gambling transactions and in its jealous desire to preserve public morality, always succeeds in my opinion, in ultimately making itself the instrument of injustice and the protector of the dishonest against the honest gambler Considering that in all mercantile operations on a large scale there must evidently be a considerable element of what the law calls wagering, we find in an instructive case of this kind how hardly the legal doctrine of wagering may often press against the innocent and shield the guilty It cannot be doubted that but for the apprehension of those whose

were a limited company registered under the Indian Companies Act having its registered office in Bombay, and carrying on business as carriers by sea.

By a charter-party dated the 1st April 1915, the defendants let to Messrs. Chhagandas & Co., a firm of freight contractors, the S. S. Hejaz belonging to the defendants for a voyage to Naples, Genoa and/or Marseilles, via the Suez Canal, any two discharging ports at charterer's option or as near thereunto as she might safely get. By a subsequent arrangement the S. S. Jeddah was substituted for the S. S. Hejaz.

Under shipping orders received by the plaintiffs from the firm of Chhagandas & Co., the defendants received on board the S. S. Jeddah 2,500 bales of cotton belonging to the plaintiffs to be carried to Genoa. The plaintiffs paid to the defendants a sum of Rs. 32,615-6-2 being the aggregate amount of freight in respect of carriage of the said goods to Genoa. The defendants thereupon issued to the plaintiffs 25 bills of lading in respect of the cotton shipped on board.

After shipment, the plaintiffs were informed by the Collector of Customs on or about the 6th May 1915, that the export of cotton to Genoa could not be allowed. The defendants finding after representations made to Government that the steamer would not be allowed to proceed eventually decided to abandon the voyage and *to put back the said steamer into dock and discharge* the cotton so shipped. Before returning the plaintiffs' cotton to them, the defendants required the plaintiffs to pay them the sum of Rs. 12,500, computed at the rate of Rs. 5 per bale to cover certain expenses and loss alleged to have been incurred by them. The plaintiffs paid the amount under protest. The plaintiffs subsequently demanded the return of the amount of Rs. 32,610-6-2 paid as freight under the contract of

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carriage, alleging that as the defendants had not performed their part of the contract, they were not entitled to retain the said sum They also called upon the defendants to furnish them with a statement of account of money payable by the plaintiffs in respect of the unloading and re-delivery of cotton by the defendants to the plaintiffs The defendants denied their liability to repay the said sum, contending that they were at all times willing and ready to carry out the said contract so far as lay in their power, that the action of the Government authorities made the carrying out of the said contract impossible if not illegal, and that the loss must lie as it fell The defendants also relied upon a slip attached to the shipping orders, but not to the bills of lading, issued to the plaintiffs after the said goods had been taken on board the said steamer The slip ran as follows —

In the event of war being declared or commenced between the country to which either the shipowners or the shippers belong and any other country the shipowners shall have the option of either cancelling their contract or of fulfilling it but if they elect to fulfil it any bill of lading which may have already been granted in respect of goods shipped under the contract shall be deemed to contain and any bill of lading which may thereafter be granted in respect of such goods as aforesaid shall contain a condition that all risks arising from such war shall be borne by the shippers and the occurrence of any such risks shall not deprive the shipowners of their right to receive payment of the freight or other payment for the carriage of the said goods which may be payable under the terms of the bill of lading

As regards the expenses of unloading and the loss for detention, the defendants claimed to retain Rs 5,038 3-7 and the balance of Rs, 7,461-12-5 was brought by them into Court

Strangman and *Desai*, for the plaintiffs

Weldon and *Campbell* for the defendants

MACLEOD, J —The defendant Steamer Company entered into an agreement, on the 1st April 1915, with

the firm of Chhagandas & Co whereby the latter chartered the steamer Hejaz for a voyage Bombay to Naples, Genoa and/or Marseilles any two discharging ports at charterer's option On the 14th April, the Jeddah was substituted for the Hejaz The plaintiffs procured from Chhagandas & Co freight for 2,500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants The 2,500 bales were put on board the Jeddah and twenty-five bills of lading relating to them were issued by the defendants who were paid Rs 32,610-6-2 for freight Owing however to the import of cotton into Genoa being prohibited by orders of Government the Jeddah did not leave the harbour and the voyage had to be abandoned Negotiations were entered into with the various shippers of cotton which are set out in the correspondence annexed to the pleadings, but eventually the Jeddah unloaded her cargo in the Alexandra Dock Before getting delivery of their cotton the plaintiffs were asked to deposit Rs 12 000 to cover the expenses and loss incurred by the ship and this sum was paid The plaintiffs, thereupon, demanded the return of the amount paid by them for freight but the defendants claimed that under the events which had happened they were entitled to retain the money and especially relied upon the second slip attached to the shipping orders The plaintiffs, therefore filed this suit to recover the freight and for an account of the Rs 12,000 paid by them to defray the costs of unloading If the Indian Contract Act applies, the contract became void under section 56 of the Act and the defendants were bound, under section 65 to restore to the plaintiffs the advantage they had received under the contract

But it has been contended, first that money paid in advance for freight is irrecoverable at law Secondly, that the defendants are common carriers and that under

the decision of the Privy Council in the case of *The Irrawaddy Flotilla Company* v *Bugwandas*[1] the rights and liabilities of common carriers are outside the Indian Contract Act and are governed by the principles of English law as modified by the Common Carriers Act of 1865

By the policy of the law of England freight and wages strictly so called do not become due until the voyage has been performed But it is competent to the parties to a charter-party to covenant by express stipulation in such manner as to control the general operations of law per Lord Ellenborough C J in *De Silvale* v *Kendall*[2]

Now the defendants, for their first proposition, relied on the case of *Kirchner* v *Venus*[3] where it was held that freight paid in advance lost its legal character of freight and was money paid to the ship-owners for taking the goods on board and undertaking to carry them to their destination, while freight in law was money paid for the carriage of the goods and was payable on the arrival of the goods at their destination though it might, under the terms of the contract, be payable at the port of departure But the question in that case was whether the ship owner had a lien for freight on goods shipped from Liverpool to Sydney when, under the terms of the charter the freight was to be paid in Liverpool one month after the date of sailing and as a matter of fact, had not been so paid before the ship arrived at Sydney, and it was decided that as the money so to be paid was not freight in law the ship-owner had no lien on the goods I doubt whether in these days such a contract for the carriage of goods would be likely to be made in India, either

(1) (1891) 18 Cal 620

(2) (1815) 4 M & S 37 at p 42

(3) (1859) 12 M P C 361

the freight is paid before the goods are shipped in which case the shipper would insure the freight, or the freight is payable on arrival in which case the ship owners would insure. Though if it is a term of the contract that freight is payable ship lost or not lost, the shipper would have to insure in any case.

But freight to be paid in advance is not irrecoverable because it loses its legal character of freight but because by the common law of England the general rule is that when a contract becomes impossible of performance by the failure of a state of things contemplated as the foundation of the contract to exist the parties are excused from further performance and acquire no rights of action, so that each must bear any loss or expense already incurred, and cannot recover back any payment in advance. *Civil Service Co-operative Society* v. *General Steam Navigation Company*[1].

Reading the charter-party, the shipping orders and the bills of lading together, I think that the money paid by the plaintiffs was freight paid in advance under the terms of the contract and was not merely money payable in Bombay on the completion of the voyage which was paid prematurely at the will of the plaintiffs, as was the money paid for freight in the case of *Krall* v. *Burnett*[2]. It is admitted that under the common law of England the plaintiffs would not be able to recover because the contract became impossible of performance and it is argued that the common law of England applies because the defendants are common carriers. The following definition of a common carrier by Parsons was approved by Cockburn C. J. in the case of *Nugent* v. *Smith*[3]:

> A common carrier is one who offers to carry goods for any person between certain termini and on a certain route. He is bound to carry for all who

(1) [1903] 2 K. B. 756. (2) (1877) 25 W. R. 305.

(3) (1876) 1 C. P. D. 423 at p. 427.

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tender to him goods and the price of carriage and insures these goods against all loss but that arising from the act of God or the public enemy and has a lien on the goods for the price of the carriage

A common carrier is also entitled when goods are offered *to him to demand and to be paid the* full price of carriage, and if this is not paid he may lawfully refuse to carry at all But the price demanded must be a reasonable one It is also essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him

Now the preamble to Act III of 1865 states "Where is it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves their servants or agents," and under section 2 "'Common Carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place by land or inland navigation, for all persons indiscriminately,' thus excluding carriers by sea Therefore, carriers by sea in India are not entitled to the benefits of Act III of 1865 though it may be a question whether the common law of England is not still applicable to them

In the case of *The British India Steam Navigation Company* v *Hajee Mahomed Esack and Company*[1] the Court seems to have assumed it without further consideration but considering the terms of the preamble I should feel inclined to doubt it The law relating to the liability of common carriers was first established by our Courts with reference to carriers by land In

[1] (1881) 3 Mad 107

the case of *Rich* v *Kneeland*[1] it was decided that the common waterman or carrier by water stood on the same footing as a common carrier by land The first case in which the liability of the owner of a sea going ship comes in question was *Morse* v *Slue*[2], see per Cockburn C J in the case of *Nugent* v *Smith*[3] Now it is interesting to note that in that case it was argued in the lower Court though without success, that the liability of the defendants Company which agreed to carry the plaintiff's mare by steamer from London to Aberdeen could not be made to rest on the allegation that they were common carriers because it was said that liability was imposed by the custom of the realm and such a custom could not have force beyond the realm

It may be that the owners of coasting steamers should be considered on the same footing as carriers by inland navigation but it would be difficult for owners of seagoing steamers to come within the definition of 'common carriers' though of course it is not impossible, and as the Indian Legislature designedly excluded common carriers by sea from the benefits of Act III of 1865 they may have intended to bring their liability under the common law of bailment

But even supposing the defendants Company run general ships as common carriers, the next question is whether in this particular case when they chartered the whole ship to Chhagandas & Co they can be treated as common carriers The whole question was very fully discussed in the case of *Nugent* v *Smith*,[3] above-cited, by Cockburn C J (though it was not necessary for the decision of the case) in order to meet the opinion expressed by Brett J in the lower Court that by the

(1) (1614) Cro Jac 330 Hob 17 (2) (1672) 1 Vent 190

(3) (1876) 1 C P D 423

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law of England all carriers by sea were subject to the liability which by that law undoubtedly attached to common carriers whether by sea or land

All Jurists who treat of this form of bailment carefully distinguish between the common carrier and the private ship But if the owner of a ship employs it on his account generally he will not be deemed a common carrier but a mere private carrier (Story) But the learned author does not say what would be the case where a ship owner *holds himself out as ready to send* his vessel with cargo to any place that may be agreed on on a private bargain and not as a general ship

I cannot help seeing the difficulty which stands in the way of the ruling in the case of *Liver Alkali Co* v *Johnson*[1] that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him while it never has been held and as it seems to me could not be held *that a person who lets out vessels or vehicles to individual customers* on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it

The importance of the question is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charterparty or bill of lading

Therefore, it is not sufficient to say that because the defendants' Company own steamers and carry goods by sea they are common carriers For all I know they may own general ships, though there is no evidence that they run any ships on a particular line between certain termini on which they are bound to carry goods for the public on receipt of reasonable charges Even if they did that would not make them common carriers as regards ships let out on charter In this case the whole ship had been chartered by Chhagandas & Co who brought the persons to whom they sold cargo space into contractual relationship with the defendants Therefore the ship was not a general ship the owners of which were bound *to carry goods for any of the public* who might wish to despatch their goods in her

(1) (1874) L R 9 Ex 338

The last question is whether [illegible] defendants are common carriers [illegible] Contract Act applicable to all contra[illegible] applicable to the contract in this cas[illegible] *The Irrawaddy Flotilla Company* [illegible] only question was whether the Chap[illegible] relating to bailments applied Their Lor[illegible] only dealing with the liability of commo[illegible] the common law of England relating to co[illegible] only differs from the common law of contra[illegible] of their liability as bailees They held that [illegible] of 1865 which codified only a part of the comm[illegible] relating to the liability of common carrier[illegible] repealed by the Indian Contract Act It was inte[illegible] to leave the law in India relating to the liability [illegible] common carriers as it was that is to say, partly go[illegible]ed by the common law and partly by Act III of 18[illegible] and not to substitute for that part of the common law which was not included in Act III of 1865 the provisions of the Act

I do not think that when their Lordships said that there was in India before the Indian Contract Act a complete code for common carriers they intended to decide that the general provisions of the common law relating to the formation and performance of contracts, should still be applicable to contracts entered into by the public with common carriers

The defendants appear to have conceded this before the hearing as it is nowhere suggested in the corres pondence before suit or in the pleadings that the defendants were common carriers The plaintiffs were asked to admit that the ship was under charter to Chhagandas & Co and in para 5 of the written state- ment the defendants rely on section 56 of the Indian

(1) (1891) 18 Cal 620

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Contract Act The defence was really based on the decision in the case of *Civil Service Co-operative Society* v *General Steam Navigation Company*[1] which is applicable to all contracts and not only to contracts with common carriers

The special provisions of the common law of common *carriers dealt with their liability and nothing else, and* formed a special chapter of the law of bailment Therefore, in any event, in my opinion, the case is governed by section 65 of the Indian Contract Act, and the plaintiffs are entitled, under the events which have happened, to recover the amount paid by them in advance for freight with interest at 6 per cent from the 15th June 1915

As regards the account rendered for expenses, the defendants have conceded that demurrage should only be charged for twenty-five days and the item for demurrage on waggons should be omitted

The plaintiffs contest the item for insurance, on the ground that they were not informed that the defendants were going to insure the goods and if they had been, they would have asked the defendants not to insure as their goods were covered by a general policy It is interesting to contrast the defendants' anxiety to insure the goods with their present contention that they were common carriers However, I must accept Mr Wardlaw Milne's evidence that at a meeting with the shippers on the 20th May the question of insuring the goods was discussed, so that plaintiffs must have had notice and could have told the defendants if they wished them not to insure their goods

The charges for labour for removing the goods to Tank Bunder must stand, as the plaintiffs have not

(1) [1903] 2 K B 756

proved that the defendants could have obtained cheaper rates for the work to be done considering all the circumstances of the case and especially the time of year

As the defendants have paid into Court more than sufficient to meet the balance for expenses that can be set off against the freight which is repayable, there will be a decree for plaintiffs for the amount of the freight paid with interest at 6 per cent, from 15th June 1915, till judgment with costs and interest on judgment at 6 per cent

Solicitors for plaintiffs Messrs *Crawford, Brown & Co*
Solicitors for defendants Messrs *Little & Co*

Suit decreed

G G N

APPELLATE CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Heaton

SAYAD AMIR SAHEB VALAD SAYAD SAIDUMIA KADRI AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS v SHEKH MASLIUDIN VALAD GULAM MOHIUDIN BY HIS GUARDIAN *ad litem* THE TALUKDARI SETTLEMENT OFFICER OF GUJARAT AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS° 1916 February 24

Civil Procedure Code (Act V of 1908) section 92—Suit for administration of religious vakf property—Court of Wards Act (Bom Act I of 1905) sections 31 and 32—Court of Wards added as guardian ad litem in appeal—Omission to name such a guardian from the commencement not fatal to the suit—Suit not bad for want of notice under section 31 of the Court of Wards Act—Cross objections—Stamps

The plaintiffs instituted a suit under section 92 of the Civil Procedure Code 1908 for the administration and management of a religious wakf property against the trustees of the institution Out of the four trustees the District Judge found defendants Nos 1 to 3 to be defaulting trustees and ordered defendant No 1 to refund Rs 6 000 to the institution In providing for the appointment of new trustees however the Judge included defendant No 4 as one of the

° First Appeal No 50 of 1915

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trustees though he was found liable in respect of costs Aggrieved by this the plaintiff appealed to the High Court where pending the appeal the Court of Wards as the guardian *ad litem* of 1st defendant was added as a party respondent and cross objections were filed on its behalf to the effect that the suit was bad under section 32 of the Court of Wards Act 1905 and that no notice having been given to the Court of Wards as required by section 31 of the Act the decree was not binding on defendant No 1 The plaintiffs appellants contended that the cross objections were not properly stamped

Held that the cross objections must be stamped as on an appeal relating to the sum of Rs 6 000 decreed against 1st defendant

Held also that the suit was not bad on the ground that the statutory notice provided for by section 31 had not been given since it was a suit relating to the property of a religious institution and not to the property of the 1st defendant

Held further that the suit was not bad under section 32 of the Court of Wards Act as the section did not say that if the Court of Ward was not named as guardian from the commencement the suit was bad The omission might under the circumstances be treated as a mere defect or irregularity in procedure not affecting the merits of the case or the jurisdiction of the Court and be corrected under section 152 of the Civil Procedure Code 1908

Rup Chand v *Dasodha*[1] and *Mussammat Bibi Walian* v *Banke Behari Pershad Singh*[2] followed

FIRST appeal against the decision of B C Kennedy, District Judge of Ahmedabad

Suit for administration

The plaintiffs sued under section 92 of the Civil Procedure Code, 1908, to formulate a scheme for the administration and management of plaint religious wakf property

The District Judge found that out of the four trustees who were managing the institution, the defendants Nos 1 to 3 were responsible for the loss caused to the institution as a result of bad management and ordered defendant No 1 to refund Rs 6,515 to the institution and on his failing to do so the sum was to be recovered from defendants No 2 and 3 Defendant No 4 was

(1) (1907) 30 All 55 (2) (1903) L R 30 I A 182

found liable only in respect of certain costs but he was not found to be a defaulting trustee In providing for the appointment of new trustees the District Judge, however included defendant No 1 as one of the trustees

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The plaintiffs being aggrieved by the latter order of the District Judge appealed to the High Court where pending the appeal, the Court of Wards was added as the guardian *ad litem* of 1st defendant as a party respondent by an *ex parte* order and the following cross-objections were filed on its behalf by the Talukdari Settlement Officer —

(1) The property of defendant No 1 having been placed under the superintendence of the Court of Wards under Bombay Act I of 1905 since the 9th of December 1909 (Bombay Government Gazette, 9th December 1909, Part I, page 2451) and the Court of Wards not having been appointed as guardian *ad litem* to represent him (defendant No 1) in the suit which was filed subsequently, the decree of the lower Court is a nullity at least so far as he is concerned

"(2) No notice having been given to the Court of Wards as required by section 31 of Bombay Act I of 1905, the decree passed by the lower Court is a nullity as against defendant No 1

N K Mehta in support of cross objections on behalf of the Court of Wards as guardian *ad litem* of respondent No 1 —We say that the decree is bad at least so far as defendant No 1 is concerned (1) because he has been a "Government Ward" within the meaning of section 2 *(a)* of the Court of Wards Act (Bom Act I of 1905), and the Court of Wards having had the superintendence of his property under the Act *before* the institution of the suit, notice as to the institution of the suit as required

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by section 31 of the Act was necessary to the Court of Wards, and (2) because the suit was brought directly against defendant, and the Court of Wards was not named as his guardian *ad litem* as required by section 32 of the Act

The words "relating to person or property" in section 31 of the Act mean relating to personal or real rights, and so in every suit against a Government Ward, the section requires notice to be given in writing to the Court of Wards see *Venkatachelapathy* v *Sri Rajah B S V Siva Row Naidu Bahadur* (1) which was decided under a corresponding provision under Madras Act I of 1902, section 40 As for point (2), we say that the Court of Wards ought to have been named in the suit as guardian *ad litem* of defendant No 1 under section 32 and that not having been done the decree against him is bad There has been no decision of our High Court under the Act on this point But under the corresponding section of an analogous Act (section 205 of Act XIX of 1873 N W Provinces Act) it has been held that a decree passed in similar circumstances is bad against the ward see *Sheo Dial Chaubey* v *The Collector of Gorakhpur*,(2) *Muazzam Ali Shah* v *Chunni Lal* (3) and section 49 of Act VII of 1899, U P Code

Further, it has been held that the provisions of Order 32, rule 3 of Civil Procedure Code, 1908, as to the appointment of a guardian *ad litem* are imperative and where these provisions are not substantially complied with, the minor is not properly represented and any decree passed against him is a nullity *Hanuman Prasad* v *Muhammad Ishaq*(4)

As to the inadequacy of Court fees paid no objections were raised by the Taxing Officer and therefore the

(1) (1912) 37 Mad 283
(2) (1883) 5 All 264
(3) (1911) 33 All 791
(4) (1906) 28 All 137

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other side cannot raise the point Court-Fees Act, section 5 *Ranga Pai* v *Baba*[1] and *Kasturi Chetti* v *Deputy Collector Bellary*[2]

G N Thakor, for the appellant —The Talukdari Settlement Officer is Court of Wards has no *locus standi* in appeal The only person who can file cross-objections is a person who was a party to the suit

This is not a suit relating to the person or property of the ward Defendant No 1 is sued in the capacity of a trustee not in respect of his property but in respect of the trust property of the institution under section 92 of the Civil Procedure Code 1908 The defendant had mixed up the funds belonging to the Trust with that of his own They do not thereby cease to be the property of the institution

The mere fact that the decree may eventually be executed against the person of a party would not make the suit as one relating to his person Suits relating to persons are suits relating to marriage, adoption, custody, &c, of the ward *Sharifa* v *Munekhan*[3], *Venkatachelapathy* v *Sri Rajah B S V Sura Row Naidu Bahadur*[4] Bengal Code (Act IX of 1879), N W P Act (XIX of 1873), section 205 referred to

As regards section 32 of the Act, it does not lay down any consequences of the provision not having been strictly followed and it does not follow that the decree is a nullity Even in the case of a minor such defects have been treated as mere irregularities *Mussammat Bibi Walian* v *Banke Behari Pershad Singh*[5], *Hari Saran Moitra* v *Bhubaneswari Debi*[6] and *Natesayyan* v *Narasimmayyar*[7]

(1) (1897) 20 Mad 398
(2) (1898) 21 Mad 269
(3) (1901) 25 Bom 574
(4) (1912) 37 Mad 283
(5) (1903) L R 30 I A 182
(6) (1888) L R 15 I A 195
(7) (1890) 13 Mad 480

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N K Mehta in reply

G K Parekh, for respondent No 2, supported Mr Thakor

SCOTT, C J —The plaintiffs who are the present appellants instituted a suit under section 92 of the Code of Civil Procedure for the administration and management of certain religious wakf property The learned District Judge after an investigation found certain of the trustees liable for certain sums The fourth trustee was found liable only in respect of certain costs, but he was not found to be a defaulting trustee In providing for the appointment of new trustees, the learned District Judge has included the fourth defendant as one of the trustees That is substantially the ground of the plaintiffs' appeal to this Court, but it does not appear to us that there is any such blame attaching to the fourth defendant upon the finding of the lower Court as should induce us to hold that he is not a fit and proper person to be a trustee under the new scheme The appeal therefore, must be dismissed

That, however, is not the only question which we have to determine now for it appears upon certain information brought to our notice by Mr Mehta, who appears under instructions from the Talukdari Settlement Officer as the Court of Wards in charge of the superintendence of the property of the first defendant, that that defendant has now, and since 1909, been a Government ward under the Court of Wards, and was so at the date of the institution of this suit on the 20th of December 1910, and although there was a full hearing of charges against the 1st defendant as a defaulting trustee in the Court of the District Judge the Government Officer acting as the Court of Wards wishes to establish that by reason of defects in procedure provided by the Court of Wards Act I of 1905, the whole proceedings so far as the first defendant is concerned are a

nullity including the decree for restoration of Rs 6,000 found to be in his possession as a trustee liable to refund The point has been brought to the notice of the Court in the form of cross-objections as the Court of Wards was added as a party respondent by *ex parte* order It has been contended on behalf of the appellants that the cross objections are not properly stamped We think that this contention is well-founded

They must be stamped upon the footing of an appeal relating to the sum of Rs 6,000 decreed against the first defendant We have no information as to the manner in which the first defendant became a Government ward under the Court of Wards Act whether he is a person declared by the District Court after application and inquiry to be incapable of managing, or unfitted to manage his own property, on account of physical or mental defect or infirmity, or such habits as cause, or are likely to cause injury to his property or to the well-being of inferior holders under section 5 of the Act or whether he is a land-holder who has applied in writing to the Governor in Council under section 9 of the Act, to have the property placed under the superintendence of the Court of Wards In the absence of any evidence of a declaration by the District Court under section 5, it would probably be safe to assume that he has made the application under section 9 The point, however is not very material The first defendant was sued with the other trustees of a Mahomedan religious institution and has been found to have been in possession of the trust funds for a long series of years Being found to be responsible for a sum of upwards of Rs 6,000 which has come to his hands a decree has been passed against him That decree was passed in a suit under section 92 of the Civil Procedure Code properly instituted in relation to a public charitable or religious trust

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The question then will be whether the town of Mahad falls within or without what was meant by the Judges when they said that the Mayukha is the prevailing authority as well in the North Konkan as in the island of Bombay and the province of Gujarat. In the first place it is desirable to have a clear understanding as to what is meant by the "Konkan." That phrase is explained in the first sentence in the introduction to the Bombay Gazetteer, Vol. I, Part II, where we read:—"The Konkan is now held to include all the land which lies between the Western Ghats and the Indian Ocean from the latitude of Daman on the North to that of Terekhol on the Goa frontier, on the South." In Vol. II at p. 20 of Mr. Erskine's History of the Emperors Babar and Humayun the learned author says:—"After the death of Muzaffar Shah, several of his descendants increased the territory of Gujarat. His grandson Ahmed Shah, a very distinguished prince and the founder of Ahmedabad, reduced under his power nearly the whole country that forms the present *Gujarat including the low lands to the South below* the ghats, the Northern Konkan and the island of Bombay." This passage is cited towards the end of Sir Michael Westropp's judgment in *Sakharam Sadashiv Adhikari v. Sitabai*,[1] and constitutes one of the earliest pronouncements of the Court in favour of the predominance of the Mayukha in the Northern Konkan. *The boundary of the Northern Konkan is not described* in this judgment, but at p. X of the Gazetteer, Vol. I, Part II, we read:—"Whatever the old signification of the word may have been, the name Konkan is now used in the sense first mentioned, and the modern division of the District is into North and South Konkan meaning the parts North and South of Bombay. The boundary *between the North and South Konkan is*, however,

[1] (1879) 3 Bom. 353.

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sometimes considered to be the Savitri river, which divides the Habshi's territory from Ratnagiri, as, for some years after the English conquest, the District of the North Konkan included the sub-divisions as far South as the Savitri" It is, in my opinion, reasonable to suppose that the "North Konkan" of Westropp, C J's judgment in *Sakharam's case*[1] was the tract denoted by the modern usage of the phrase, and not the tract extending to the Savitri river Indeed the line of division between the North and the South Konkan for our present purposes is not, I think, difficult to fix if we remember the reason upon which the difference is founded That reason is historical and flows from the circumstance that the tract called the North Konkan was ... the South Konkan was not, under the immediate sway of the kingdom of Gujarat

From a passage to be found at p 763 of Elphinstone's History of India, it appears that Bassein and Bombay were detached possessions of the kingdom of Gujarat and it seems to me clear, from the various passages to which Mr Rao has drawn our attention, that that kingdom never extended South of the towns or villages Cheul and Nagothna, which are to be found in the Northern or Alibag Taluka of the Kolaba District

In Vol I, Part II of the Gazetteer we read at p 31 — "The kingdom of Gujarat extended as far South as Nagothna and at p 45 "The Northern Konkan as far South as Nagothna had always belonged to Gujarat but the Southern Konkan had only just been divided between the dynasties of Bijapur and Ahmednagar" In the Kolaba Gazetteer, Vol XI, p 142 it is stated — "Towards the close of the 15th century (1489) the inland parts of Kolaba passed from the Brahmini to the Ahmednagar Kings The sea coast, including at least Nagothna and Cheul, remained in the hands of the

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Gujarat Kings till in 1509 the overlordship of Cheul passed from Gujarat to the Portuguese After this, though the coast boundary of Gujarat shrank from Cheul to Bombay the Gujarat Kings continued to hold the fort of Sangarza or Sankshi in Pen till 1540 when it was made over to Ahmednagar" In the Thana Gazetteer Vol XIII Part II there are two passages bearing upon the same point One of them runs —

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Some years later (1508) Mahmud Begada still further increased his power He effected his designs against Bassein and Bombay established a garrison at Nagothana and sent an army to Cheul At this time when Gujarat power was at its highest according to the Mirat-i-Ahmadi Daman Bassein and Bombay were included within the Gujarat limits" (p 443) The other passage, at p 448 referring to a later period says — "A few years later (1514) the Southern boundary of Gujarat had shrunk from Cheul to Bombay'

In accordance with the history thus narrated, we find that, after the establishment of British authority, Mahad was by the earliest authorities included in the Southern Konkan At p 159 of the Kolaba Gazetteer, Vol XI, the change is described in these words —"After they came into the hands of the British in 1818, the three sub-divisions of Sankshi (Pen), Rajpuri (Roha), and Rayagad formed the Northern part of the South Konkan or Ratnagiri Collectorate " and in a foot-note in which the details of these acquisitions are set forth, we read that "the British Government took possession of the sub-divisions of Sankshi, Rajpuri, and Rayagad, then forming the Northern part of the South Konkan" This tradition is continued in the Government Selections, New Series No 278, pp 12 and 13, where the term 'South Konkan' is distinguished from 'North Konkan' is explained as the tract including all the present Kolaba District, except the Talukas Karjat and Panvel,

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which are to the North of the Alibag Taluka of Kolaba, being separated from it by the Dharamtar creek.

These historical references satisfy me that when the learned Judges of this Court spoke of the tract of country known as the North Konkan being under the predominance of the Mayukha, that tract was understood to extend no further South than the Alibag Taluka, and therefore cannot be held to have comprised the town of Mahad.

The only decided case from which the appellant seeks support for his argument is Sir Michael Westropp's decision in *Sakharam Sadashiv Adhikari* v. *Sitabai*.(1) There, as I have stated, the passage from Mr. Erskine's history is cited, and the undefined term "Northern Konkan" is brought within the ambit of the paramountcy of the Mayukha. That case, however, is, in my opinion, of no assistance to the present appellant, for the learned Judges there did not define what they meant to include in the term "North Konkan," and the case before them came from Karanja which is just across the harbour from the island of Bombay. The historical references in the judgment are no more than the basis for the conclusion which is expressed on pp. 367-368, that it would be incongruous to declare that the Hindus on the one side of the harbour were subject to another law of succession from that which governed those on the other side. At the most the case would be an authority for the view that the phrase "North Konkan" must be held to include Karanja, but as Karanja is very much to the north of Mahad, that decision would not serve the appellant's turn. It is also to be observed that the observations now under notice were made *obiter* as the decision of the case was based on other grounds which will be found explained at

(1) (1879) 3 Bom. 353.

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pp 363 and 368 of the report This being so, it is not possible to follow Mr Jayakar's argument when he would fasten supreme importance on a passing phrase in which the learned Chief Justice notices the historical fact that formerly the boundary between the Northern and Southern Konkan was deemed to be the Savitri river which divides the Habshi's territory from the Ratnagiri Collectorate and enters the sea at Bankot The Court by no means decides, as would be necessary for the plaintiff's case, that the Savitri river was then the boundary between the North and South Konkan It is merely stated that at some previous time the river was deemed or supposed to be the boundary In my opinion the authorities to which I have alluded establish that the town of Mahad is not within the Northern Konkan, which the Judges have referred to as subject to the predominance of the Mayukha and the predominance of the Mayukha cannot either on principle or on authority be taken further South than Cheul and Nagothna or than the point where it appears to have been carried by the decision in *Sakharam Sadashiv Adhikari* v *Sitabai*[1] For these reasons I think that the lower appellate Court's decree is right and that this appeal should be dismissed with costs

Shah, J —I am of the same opinion, generally for the reasons given by my learned brother

It is quite clear that Mahad forms part of the Southern Konkan where the Mitakshara and not the Vyavahara Mayukha is the governing authority on points of Hindu Law, when there is a conflict between them

Appeal dismissed

R R

(1) (1879) 3 Bom 353

PRIVY COUNCIL *

1916
May 26 29
June 22

RAMDAS VITHALDAS DURBAR (1st DEFENDANT) v. AMERCHAND & Co (2ND DEFENDANTS) AND ANOTHER APPEAL. TWO APPEALS CONSOLIDATED

[On appeal from the High Court of Judicature at Bombay]

Contract Act (IX of 1872) section 103—Transfer of Property Act (IV of 1882 as amended by Act II of 1900) sections 4 and 137— Instrument of title to goods—Railway receipt—Stoppage in transit—Assignment of railway receipt effect of

On this appeal their Lordships of the Judicial Committee (upholding the decision of the High Court in *Amerchand & Co* v *Ramdas Vithaldas Durbar* I L R 38 Bom 255) held the railway receipt in question in the case was an instrument of title within the meaning of section 103 of the Contract Act (IX of 1872)

Two consolidated appeals 122 and 123 of 1915 from two decrees (31st March 1913) of the High Court at Bombay in its Appellate Jurisdiction, which reversed the decrees (11th January and 13th February 1912) of two single Judges of the same Court, sitting respectively in the exercise of its Original Jurisdiction

The question in each appeal was whether a railway receipt in a certain form issued to the consignor of goods is an instrument of title to the goods within the meaning of section 103 of the Contract Act (IX of 1872) and whether when the consignee has delivered the receipt to a person who has advanced money to him on it with an endorsement requesting delivery to such person, the consignor s right of stoppage in transit as an unpaid vendor becomes subject to payment of the advance

The facts of the case will be found in the report of the hearing of the appeals in the High Court (SIR BASIL

* *Present* —Lord Atkinson, Lord Parker of Waddington, Sir John Edge, and Mr Ameer Ali.

SCOTT C J and CHANDAVARKAR J) where of the two judgments of the Original Courts (MACLEOD J of 11th January 1912 and BEAMAN J of 12th of February 1912), which were to the same effect that of MACLEOD J in the suit which gave rise to appeal 122 is set out so far as material and where the form of the receipt and the portions thereof material to the present appeals are given see I L R 38 Bom 255

On these appeals

De Gruyther K C and *E B Raikes* for the appellant contended that the railway receipts in question were not "instruments of title' to goods within the meaning of section 103 of the Contract Act (IX of 1872) An 'instrument of title' was not intended, it was submitted, to be similar to a 'document of title," or document showing title" referred to in other sections of the Act as in sections 102 and 108, but was a document of the same nature and effect as a bill of lading, that is one the transfer of which would be equivalent to a delivery of the goods it covered A railway receipt was of a different nature and effect and therefore it was not an "instrument of title" within section 103, though it might be a "document of title' or a 'document showing title' The Contract Act must be taken as embodying the English Law in force at the time it was passed The law as to contracts was practically the same, except that *in 1877 the Factors' Act* (40 and 41, Vict C 39) was passed and had never been applied to India the law therefore, in India, when the Contract Act was passed was the English law before 1877 The effect of sections 4 and 137 of the Transfer of Property Act (IV of 1882 as amended by Act II of 1900) was not to extend the meaning of the expression "instrument of title" in section 103 to a 'railway receipt' In the case of *The Great Indian Peninsula Railway*

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Company v *Hanmandas Ramkison*[1] a "railway receipt" similar to that now in suit, was held to be not an "instrument of title" within section 103 of the Contract Act That Act did not deal in sections 108 and 178 with a pledge of goods by the owner under those sections there would be no valid pledge without delivery of the goods, and if a railway receipt were given there would be no valid pledge unless that document was accepted as being equivalent to the delivery of the goods To have that effect automatically there must be some document which is negotiable like a bill of lading the delivery of which alone amounted to a stoppage of the goods in transit Reference was made to *Merchant Banking Company of London* v *Phœnix Bessemer Steel Company*[2] and *The Tigress*[3] 'Instrument of title" meant a document which gives a person title and enables him to pass that title to a transferee that is the effect of a bill of lading A "document of title" is one which only gives a person a title to the goods, and that it was submitted, was the only effect of a railway receipt like those in suit

Sir H Erle Richards K C and *Sir W Garth* for the respondents contended that the railway receipt in suit was an 'instrument of title' within the meaning of the Contract Act, section 108 No distinction was intended to be made between that expression and the other expressions "document of title,' and "document showing title used in other sections of the Act If there were any doubt as to the expressions "instrument of title and 'document of title ' it is removed by section 137 of the Transfer of Property Act (IV of 1882 as amended by Act II of 1900) which by section 4 is made part of the Contract Act, and which expressly includes a 'railway receipt ' There was no presumption

(1) (1889) 14 Bom 57 at p 66 (2) (1877) 5 Ch D 205
(3) (1863) 32 L J Adm 97

that the Contract Act represented the English law, which at that time on the matters to which section 103 relates was uncertain Lord Blackburn's view was accepted in England see Benjamin on Sale 5th Ed, pages 847 851 Carver's on Carriage by Sea, 5th Ed, page 684 section 552 and *Farina* v *Home*[1] which was not overruled until the Factors Act, 1877 (40 and 41 Vict C 39) The English law is now contained in the Factors Act 1889 section 10 and the Sale of Goods Act, 1893, section 47 see Chalmers on Sale of Goods Act page 136 The case of *The Great Indian Peninsula Railway Company* v *Hanmandas Ramkisson*[2] was wrongly decided

De Gruyther K C in reply referred to Benjamin on Sale 5th Ed page 852

1916 June 22nd —The judgment of their Lordships was delivered by

LORD PARKER —The question which arises on these appeals is whether a railway receipt issued to the consignor of goods in the form appearing on pp 70 and 71 of the record is "an instrument of title" within the meaning of section 103 of the Indian Contract Act

Section 103 of this Act is one of a group of sections relating to a seller's right to stop goods while they are in transit to the buyer Section 99 defines the right Section 100 provides that goods shall be deemed to be in transit while in course of transmission to and not yet come into the possession of the buyer Section 101 lays it down that the right does not, except in the cases thereinafter mentioned, cease on the buyers reselling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some one on his behalf

(1) (1846) 16 M & W 119

(2) (1889) 14 Bom 57

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Section 102 provides that the right of stoppage ceases if the buyer, having obtained a bill of lading or other "document showing title" to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them

The expression 'document showing title" is used again in section 108, which refers to a "bill of lading, dock warrant, ware-house-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods" The same enumeration is found in section 178, except that in this section the expression 'document of title' is substituted for "document showing title" Sections 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act No XX of 1844, which with certain modifications not material for the purposes of this appeal made the provisions of the English Factors' Act 1842, applicable to British India Both the last-mentioned Acts use the expression "document of title to goods," and define it as including "any bill of lading India warrant, dock warrant ware-house keeper s certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented' In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a document showing title or a document of title' to goods for the purposes for the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising

or purporting to authorise, either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not and indeed cannot be disputed before this Board, that the railway receipts in question satisfy this test. It is therefore unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act No. II of 1900 would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are "documents showing title to goods" within sections 102 and 103 and "documents of title to goods" within section 178 of the Indian Contract Act.

Returning to section 102, its effect may be stated as follows. First, so far as bills of lading are concerned, it enacts the rule of the common law by which a second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. Secondly, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading. If, therefore, the respondents in these appeals had been second buyers and not pledgees of the goods represented by the receipts in question, the appellant's right of stoppage would have been displaced.

Passing now to section 103, it will be found to provide that where a bill of lading or other "instrument of title" to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit. If this section had

used the expression "document showing title" or "document of title' instead of the expression "instrument of title," it is, in their Lordships' opinion, quite clear that it would have applied to the receipts in question, and that the vendor could not have stopped the goods in transit without payment or tender to the respective respondents of the amounts of their advances, which were admittedly made in good faith and specifically upon the security of the receipts in question In other words, the section would have done, in the case of assignments by way of pledge, precisely what had been done in the previous section in the case of assignments upon a resale

Great stress was naturally laid by the appellants on this difference of expression They argued that "instruments of title" were a particular species of the genus "documents of title, and they attempted to define the species as consisting of documents which conferred title in the same manner and sense as title is conferred by a bill of lading They supported this argument by the following considerations First, they contended that the Indian Contract Act was primarily a consolidating Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed Secondly, they urged the improbability of the Indian legislature having taken the lead in a legal reform for which this country had to wait until the passing of the English Factors Act of 1877 Their Lordships cannot attach any weight to either consideration The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts It is, therefore, an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing

law Again their Lordships do not see any improbability in the Indian legislature having taken the lead in a legal reform Such reform may have been long recognised as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous

It remains to consider the appellant's argument, so far as it is based on the use of the expression "instrument instead of 'document" of title In the first place it is to be observed that "title' in both expressions can relate only to the right to receive delivery of the goods to which the instrument or document relates It can have nothing to do with ownership A bill of lading may in this sense be an instrument or document conferring title but if so the same is true of all the other documents contained in the genus "document of title" The fact that a document confers title in this sense cannot, therefore, be used as the distinguishing mark of a particular species of the genus The truth is that the only point in which a bill of lading differs from other "documents of title' is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers The appellant's counsel was unable to mention, and their Lordships are not aware of any other document with this peculiarity In their Lordships' opinion the suggestion that the words "or other instrument of title" were inserted *per cautelam* in case there were any such instrument other than a bill of lading is far-fetched Moreover, they cannot help thinking that the section, if intended to have the effect for which the appellant contends, would have been otherwise worded Further, no reason can be suggested why, if (as is clearly the case) the legislature intended by section 102

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to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, it should not have by section 103 intended to do the same in favour of a *bona fide* pledgee for value Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions, "document showing title" and "document of title" in the same sense shows that the draughtsman was not very careful in his use of language

For the foregoing reasons their Lordships are of opinion that these appeals fail, and should be dismissed with costs, and they will humbly advise His Majesty accordingly

Solicitors for the appellant Messrs *Hughes & Sons*

Solicitors for the respondents Messrs *T L Wilson & Co*

Appeals dismissed

J V W

ORIGINAL CIVIL

Before Sir Basil Scott Kt Chief Justice and Mr Justice Heaton

1916
February 1

ISMAIL ALLARAKHIA (PLAINTIFF APPELLANT) v. DATTATRAYA P GANDHI (DEFENDANT RESPONDENT)*

The Indian Contract Act (IX of 1872) sections 20 and 65—Fraudulent representation and impersonation by one of the executants of a deed—Mistake as to a matter of fact essential to the agreement—A person fraudulently mortgaging property not his own—Mortgagee believing in good faith the mortgagor to be owner of property—Transfer of mortgage by mortgagee in

* Appeal No 59 of 1915

favour of a third party—Deed of transfer signed by the mortgagor as a concurring party the mortgagor again fraudulently representing to be owner—Transferor and transferee acting under the belief that the real owner concurred in the transfer—Failure of consideration—Avoidance of contract.

Under the will of their father J F and L M became entitled as tenants in common to equal moieties of a house at Mazagaon in Bombay The third son C was given a right of residence in the house so long as he lived in harmony with his brothers and sisters C however fraudulently representing himself to be his brother L M purported to create a mortgage of a moiety of the said house in favour of the defendant Subsequently the defendant in consideration of a sum of Rs 1 770 paid to him by the plaintiff transferred the said mortgage in favour of the plaintiff The plaintiff having insisted that the said L M should be a party to the deed of transfer C fraudulently representing himself to be L M joined in executing the said deed as a concurring party The plaintiff having discovered that the mortgage and the transfer deeds were not executed by L M but by a forger in his name sued the defendant as transferor for return of the purchase money as on a total failure of consideration The trial Judge applied the maxim *caveat emptor* ' and dismissed the suit The plaintiff thereupon appealed

Held that the defendant was bound under section 65 of the Indian Contract Act to repay the purchase money to the plaintiff inasmuch as both parties being in the belief that the real owner had joined in the transfer were under a mistake as to a matter of fact essential to the agreement which was therefore avoided under section 20 of the Indian Contract Act

ONE Louis Mary Valladares, a Native Christian, died at Bombay on or about the 2nd of June 1902, leaving a will dated the 30th of May 1902, by which he bequeathed his house situate at Mazagaon to two of his sons, Joseph Francis Valladares and Louis Mary Valladares as tenants in common

The material provisions of the said will ran as follows —

'I give and bequeath unto my two sons Joseph Francis Valladares and Louis Mary Valladares as tenants in common in equal shares and not as joint tenants the family house belonging to me situate at Mazagaon Each of my two unmarried daughters Mary Leopoldina and Julia Josephia to live in the said house free of rent until her marriage or death whichever shall first happen If either of the said Joseph Francis Valladares and Louis Mary Valladares shall die without leaving a widow or issue his share shall devolve

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on the survivor of them My son Calisto Valladares shall be entitled to live in the said family house free of rent during his life He must live in harmony with his brothers and sisters and when he marries he must do so with a respectable lady belonging to a respectable family, and when the said Calisto fails to live in harmony as aforesaid and acts contrary to the directions hereinbefore contained he shall forfeit his right to live in the said house Joseph Francis Valladares and Louis Mary Valladares to pay to him Rs 1 000 each on his giving a release

On the 13th of June 1914, the third son, Calisto, fraudulently representing himself to be Louis Mary Valladares and so entitled under the said will to an equal moiety of the said house mortgaged such equal moiety to one, Abdul Latif Haji Sumar, for a sum of Rs 1,000

On the 10th of September 1914, the said Calisto again fraudulently representing himself to be Louis Mary Valladares created a second mortgage of the same moiety of the house in favour of the defendant for Rs 1,600

Both the first mortgage and second mortgages were registered, the said Calisto fraudulently representing himself to be the said Louis Mary Valladares before the Sub-Registrar of Assurances at Bombay

On the 19th of July 1915 the defendant, by a deed of transfer, transferred his second mortgage to the plaintiff in consideration of a sum of Rs 1,700 The plaintiff having insisted that Louis Mary Valladares should be a party to the said deed to concur in the said transfer, Calisto fraudulently representing himself to be Louis Mary joined in executing the said deed as a concurring party

In the month of August 1915, the plaintiff discovered that none of the deeds of mortgage nor the deed of transfer had been executed by Louis Mary Valladares and that all had been executed by Calisto who had been guilty of forgery

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The plaintiff, thereupon claimed to recover from the defendant the sum of Rs. 1,770 with interest at 6 per cent. from the 19th of July 1915, saying that under the circumstances aforesaid the defendant had nothing to transfer to him and that there was consequently a total failure of consideration. The defendant pleaded *inter alia* that he took a second mortgage of the property believing in good faith that the person who mortgaged the said property to him was Louis Mary Valladares, and that he transferred the said mortgage to the plaintiff in the *bona fide* belief that the person who mortgaged the said property to him was Louis Mary Valladares.

The case was tried by Macleod J. who dismissed the suit. The learned Judge delivered the following judgment:—

MACLEOD, J.:—Under the will of one Louis Mary Valladares, dated the 30th May 1902, his two sons, Joseph Francis and Louis Mary Valladares became entitled as tenants-in-common of a house situate at Mazagaon. A third son, Calisto, representing himself to be his brother, Louis Mary, purported to mortgage one equal moiety of the said property to one Abdul Latif Haji Sumar, for Rs. 1,000 and executed a mortgage-deed on the 13th June 1914. On the 10th day of September 1914 Calisto purported to create a second mortgage of the said property in favour of the defendant for Rs. 1,600.

On the 19th July 1915 the defendant transferred his second mortgage to the plaintiff in consideration of Rs. 1,770. Calisto was a party to the deed of transfer which he signed in the name of his brother Louis Mary.

The plaintiff having discovered the fraud of Calisto filed this suit against the defendant to recover the

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sum of Rs 1,770 and interest thereon, on the ground that the defendant had nothing to transfer and that, therefore, there had been total failure of consideration

The defendant, in his written statement, said that he took this second mortgage from Calisto in good faith believing him to be Louis Mary and with the same *bona fide* belief transferred the second mortgage to the plaintiff and submitted that the suit should be dismissed At the hearing it was not disputed that Calisto had signed the mortgage and transfer, fraudulently passing himself off as his brother Louis Mary

Under the deed of transfer, the transferee is entitled to the full benefits of the covenants, power of sale and other powers and conditions contained in the deed of the second mortgage, but there is no covenant by the transferor that he guarantees the genuineness of the second mortgage It was argued on behalf of the plaintiff that either section 55 (2) or section 65 (1) of the Transfer of Property Act applied and that, therefore, such a covenant was implied, but this is not the case of a sale or a mortgage, and, in my opinion, the principle laid down in the cases of *Bree* v *Holbech*[1] and *Clare* v *Lamb*[2] must be followed The facts in the former case were on all fours with the facts in this case The executors of a deceased person found amongst his papers a mortgage deed and this they transferred to the plaintiff It was afterwards discovered that the deed was a forgery The Court held that the maxim "*caveat emptor*" applied and dismissed the suit

This suit must, therefore, be dismissed with costs

The plaintiff appealed

Jinnah, for the appellant

Kanga, for the respondent

(1) (1781) 2 Doug 654*a*

(2) (1875) 23 W R 389

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SCOTT C J —Under the will of Louis Mary Valladares two of his three sons, namely Joseph Francis and Louis Mary became entitled as tenants-in-common to equal moieties of the testator's house at Mazagaon The third son Calisto was, by the will, given a right of residence in the house so long as he lived in harmony with his brothers and sisters

On the 13th of June 1914, Calisto fraudulently representing himself to be his brother Louis Mary and so entitled to an equal moiety in the house purported to mortgage such moiety in favour of Abdul Latif Sumar

On the 10th of September 1914, Calisto again fraudulently representing himself to be his brother Louis Mary purported to create a second mortgage of the said moiety in favour of the defendant, Dattatraya R Gandhi

Both the first and second mortgages were registered as Calisto fraudulently represented himself to be Louis Mary before the Sub-Registrar

On the 19th of July, Calisto again fraudulently representing himself to be the said Louis Mary purported, as Louis Mary, to join in a transfer executed on that date by the defendant to the plaintiff in consideration of the sum of Rs 1,770 By the transfer Calisto personating Louis Mary purported to consent to the transfer for the sum of Rs 1,770, agreed to be the amount owing to the defendant by the mortgagor under the second mortgage of the 10th September 1914, of the second mortgage debt and the full benefit of the covenants contained in the second mortgage and to the transfer of the moiety and all the estate, right, title and interest of the mortgagee and the mortgagor therein

The mortgagee covenanted expressly that he had not incumbered The covenants of which the transferee was expressed to get the benefit with the consent

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of the mortgagor included the mortgagor's covenant for title that he had power to transfer

The intention of the transferee was clearly to have the settlement of the mortgage debt and the mortgagor's covenants for title in the second mortgage confirmed by the mortgagor For this purpose the mortgagor was a necessary party The transfer was, however never executed by him but by a forger in his name

The result was that the transferee had no recourse against the mortgagor after discovering that the second mortgage was a mere fictitious security

He now sues the defendant as transferor for return of the purchase money as on a total failure of consideration

The learned Judge being of opinion that the case could be disposed of on the authority of *Clare* v *Lamb*[1] and *Bree* v *Holbech*[2] applied the maxim "*caveat emptor*" and dismissed the suit We are unable to agree in the conclusion arrived at by the lower Court

In *Clare* v *Lamb*[1] the Court recognized the correctness of the following statement of the law in Sugden's Vendors and Purchasers[3] "Although the purchaser has paid the money, yet if he is evicted before the conveyance is executed by *all* the necessary parties, he may recover the purchase-money in an action for money had and received," and in Dart on Vendors and Purchasers that—"Until the conveyance is executed by all necessary parties the vendor remains liable in respect of all defects of title He must, for instance, refund the purchase money if the purchaser having

(1) (1875) L R 10 C P 334 at p 340 (2) (1761) 2 Doug 654a
(3) Page 549 (14th Edn)

paid it, even although having taken possession, be evicted by an adverse claimant"

In *Johnson v Johnson*[1] where a conveyance of property of a testator required execution by three trustees under the will and was only executed by two, the purchaser on eviction under a superior title for one of the parcels conveyed was held entitled to recover the purchase money in respect of that parcel

In the case before us the supposed Louis Mary was rightly deemed a necessary party to the transfer and the deed was prepared upon that footing but the transfer was never executed by Louis Mary The defendant cannot successfully rely upon the transfer till it has been executed as drawn The purchaser cannot be made liable on the maxim of *caveat emptor* if the owner from whom he believed he was to get a confirmation both of the covenant for title and of the transfer of the mortgagor's estate in the premises never in fact joined in the transfer

If the stage of complete execution by all necessary parties is not reached there is no reason for not applying the rule of the Indian Contract Act, section 20, "where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void" Here both plaintiff and defendant believed that Louis Mary was agreeing to the amount due on the mortgage and confirming the covenants contained therein, and agreeing to the transfer of the mortgagor's estate in the mortgaged premises whereas in fact he was no party to the negotiations The defendant is therefore, under section 65, bound to repay the transfer money

It is unnecessary in the view we take to discuss the arguments addressed to us on the covenants for title

[1] (1802) 3 B & P 162

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implied under section 55 (2) of the Transfer of Property Act

We set aside the decree dismissing the suit and pass a decree for the plaintiff for the sum claimed with interest and the cost of suit throughout

Solicitors for plaintiff Messrs *Mulji & Thakurdas*

Solicitors for defendant Messrs *Amin & Desai*

Decree set aside

G G N

APPELLATE CIVIL

Before Mr Justice Batchelor and Mr Justice Shah

1916 *July 25*

TANGYA FALA (ORIGINAL PLAINTIFF) APPELLANT v. TRIMBAK DAGA AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS*

Indian Contract Act (IX of 1872) section 70—Payment made for another—Non gratuitous payment—Obligation of person enjoying the benefit—Mortgage—Stranger paying off a subsisting mortgage—Subrogation

The defendant No 1 mortgaged his lands in 1893 In 1904 the mortgagee sued on the mortgage and obtained a decree for the mortgage amount or in default the sale of the property The mortgagee applied in 1905 for sale of the mortgaged property About that time the plaintiff went into possession of the lands on a ten years' lease from defendant No 1 Shortly afterwards defendant No 2 who held a money decree against defendant No 1 brought the property to sale and purchased it himself In 1907 the property was put up to sale in execution of the mortgagee's decree But defendant No 1 borrowed a sum of Rs 2 463 from the plaintiff and paid off the mortgagee Subsequently defendant No 1 sold a portion of the property mortgaged to plaintiff for Rs 4 000 the consideration being made up of Rs 2 463 with other sums lent to defendant No 1 personally In 1908 defendant No 2 sued plaintiff to recover possession of the land and obtained possession The plaintiff filed the present suit to recover the amount of Rs 4 000 from the defendants personally or by sale of the property

* First Appeal No 29 of 1915

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Held, that defendant No. 2 was not personally liable to repay Rs. 2,463 to the plaintiff under section 70 of the Indian Contract Act (IX of 1872), for it could not be said that the payment was made for defendant No. 2, the plaintiff having without reference to the second defendant intruded himself in order to make the payment without the second defendant's knowledge.

Held, further, that the land in possession of defendant No. 2 was chargeable with the sum of Rs. 2,463, because the plaintiff being a stranger who paid off a subsisting mortgage was entitled to be subrogated to the position of the mortgagee.

Held, also, that defendant No. 1 was personally liable to make good the deficiency.

Per BATCHELOR, J.:— Section 70 of the Indian Contract Act makes provision for compensation to be paid by a person enjoying the benefit of a non-gratuitous act, but for the operation of the section certain conditions are prescribed. They are that the thing done shall be lawfully done, that the intention shall not have been to do it gratuitously, and that the other person shall enjoy the benefit.

FIRST appeal from the decision of S. S. Phadnis, First Class Subordinate Judge at Dhulia.

Suit to recover a sum of money.

On the 23rd August 1893, defendant No. 1 mortgaged his two houses and two lands (Survey No. 19 and a moiety of Survey No. 172) to one Atmaram for Rs. 2,250. Atmaram (mortgagee) filed a suit in 1904 to recover the amount of the mortgage from defendant No. 1 personally or by sale of the mortgaged property. On the 12th June 1905, the mortgagee applied for sale of the property. The execution proceedings were transferred to the Collector. About this time, the plaintiff went into possession of the lands on a ten years' lease from defendant No. 1.

The defendant No. 2 held a money-decree against defendant No. 1. He applied to execute the decree, and in execution proceedings had the lands sold at a Court sale and purchased them himself for Rs. 625 on the 27th June 1905.

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On the 13th April 1907, the Collector, in execution of the mortgage decree, put the property to sale But defendant No 1 borrowed a sum of Rs 2,463 from the plaintiff and paid off the mortgage On the 17th December 1907, defendant No 1 sold the moiety of Survey No 172 to plaintiff for Rs 4,000, made up of Rs 2,463 advanced in April 1907 together with other sums lent to defendant No 1 personally

In 1908, defendant No 2 brought a suit against plaintiff to recover possession of the land from him, and recovered the same in 1911

The plaintiff filed the present suit to recover the amount of Rs 4,000 from the defendants personally or by sale of the property

The Subordinate Judge held that defendant No 1 had no saleable interest in the property at the time when he passed the sale-deed to the plaintiff, and that the plaintiff had no charge on the property in suit He held that defendant No 2 was not personally liable, as section 70 of the Indian Contract Act had no application, the payment not having been made for him A decree for Rs 3,113 was, however, passed against defendant No 1 personally

The plaintiff appealed to the High Court

G S Rao, for the appellant —We submit defendant No 2 is personally liable for Rs 2,463 The payment was made for his benefit and he enjoyed the benefit Section 70 of the Indian Contract Act applies, for the payment was lawfully made, there was no intention to make the payment gratuitously, and defendant No 2 had enjoyed the benefit of such payment see *Suchand Ghosal* v *Balaram Mardana*[1] and *Jarao Kumari* v *Basanta Kumar Roy*[2]

(1) (1910) 38 Cal. 1

(2) (1904) 32 Cal. 374

Further, the plaintiff who was a stranger having paid off a subsisting mortgage was entitled to be subrogated to the position of the mortgagee, and as such, had charge for the money advanced on the land: see *Butler v. Rice*[1]; *Gokuldoss Gopaldoss v. Rambux Seochand*[2].

M. V. Bhat, for respondent No. 2, was called upon to reply on the second point:—The doctrine of subrogation can never be applied in aid of a mere volunteer. There must be an assignment or an agreement for subrogation: see *Gurdeo Singh v. Chandrikah Singh*,[3] *Apaji Bhivrav Raghunath v. Kavji*,[4] *Vishnu v. Rango Ganesh Purandare*[5] and *Khushal v. Punamchand*.[6] The principles laid down in English cases should not be applied to Indian cases. Here we are governed by the provisions of the Transfer of Property Act (IV of 1882), section 91 of which gives a list of persons entitled to redeem a mortgage. Neither plaintiff nor defendant No. 1 would have any right to pay off the prior mortgage as defendant No. 2 had become its owner at a Court sale.

BATCHELOR, J.:—In 1893, the property in suit and certain other properties were mortgaged by their owner Daga Lahnu to one Atmaram to secure a sum of Rs. 2,250. In 1904, the mortgagee, Atmaram, brought a suit on his mortgage and obtained a decree for payment of Rs. 2,247 and costs within six months or in default, the sale of the property. On the 12th June 1905, Atmaram as decree-holder presented an application for sale of the mortgaged property. This application was transferred for execution to the Collector. On the 27th June 1905, the present second defendant, in execution of

[1] [1910] 2 Ch. 277.
[2] (1884) L. R. 11 I. A. 126.
[3] (1907) 36 Cal. 193 at p. 217.
[4] (1881) 6 Bom. 64.
[5] (1893) 18 Bom. 382.
[6] (1897) 22 Bom. 164.

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a money decree which he had obtained against Daga, brought the property to sale and purchased it himself On the 13th April 1907, in execution of Atmaram's decree on the mortgage, the Collector put the property to sale Thereupon Daga Lahanu, who was the first defendant in the suit, borrowed a sum of Rs 2,463 from the plaintiff in order to pay off Atmaram's decretal amount, and, with the money so borrowed from the plaintiff, Atmaram's decree was in fact satisfied and the threatened sale was averted On the 17th December 1907, Daga executed a sale deed in the plaintiff's favour in regard to the property now in suit, namely, a moiety of Survey No 172 The total consideration of the sale deed is Rs 4,000 made up of Rs 2,463 advanced in April 1907 by the plaintiff together with other sums lent to Daga personally In 1905, the plaintiff went into possession of the lands on a ten years' lease from Daga, but in 1908 he was ejected from possession in a suit filed by the second defendant for the recovery of possession Thereafter the plaintiff brought the present suit in which he claimed to recover Rs 4,000, the consideration of the sale deed from the first defendant, while as against the second defendant the claim was that since Atmaram's mortgage had been paid off with the plaintiff's moneys, the plaintiff should be decreed to stand in the shoes of the mortgagee, Atmaram, with the result that his advance of Rs 2,463 should be recoverable by the sale of the mortgaged land in the hands of the second defendant There was also a prayer that the sum should be decreed from the second defendant personally The learned Judge of the lower Court has given the plaintiff a decree for Rs 3,113 against the first defendant only, and the claim against the second defendant has been rejected

In this appeal Mr Rao on behalf of the plaintiff appellant raises two contentions, the first being that

under section 70 of the Indian Contract Act, defendant No. 2 is personally liable to repay to the plaintiff Rs. 246, advanced by the plaintiff to the first defendant. Section 70 of the Indian Contract Act makes provision for compensation to be paid by a person enjoying the benefit of a non-gratuitous act, but for the operation of the section certain conditions are prescribed. They are that the thing done shall be lawfully done, that the intention shall not have been to do it gratuitously, and that the other person shall enjoy the benefit. I will assume in the plaintiff's favour that these three conditions are in the present case satisfied. There remains the condition expressed in the first words of the section which are "where a person lawfully does anything *for* another person." The plaintiff's case here is that the payment of Atmaram's mortgage was the thing done by him for the second defendant. I am of opinion, however, that that claim is not substantiated. There is no doubt about the facts which are that the payment was made not only without the consent, but without the knowledge, of the second defendant. On the evidence on the record I am of opinion that the object of the payment was to benefit the plaintiff himself. Moreover, while it does not appear that the second defendant would not have paid off the mortgage himself if the matter had been brought to his attention it does appear that the plaintiff, in making the payment behind the back of the second defendant, was depriving the second defendant of an option which the law allowed him to exercise. For to the second defendant it was open either to pay off the mortgage or to stand by and let the property be sold. When, therefore, the plaintiff without reference to the second defendant intruded himself in order to make the payment without the second defendant's knowledge, I am of opinion that it cannot be said that such payment was made for the second defendant. That is the view of the learned Judge of

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the lower Court. As was observed by Sir Lawrence Jenkins in *Suchand Ghosal v. Balaram Mardana*[1] the question which the Courts have to decide under section 70 of the Indian Contract Act is almost entirely, if not entirely, a question of fact. I may add that the case before us is on its facts readily distinguishable from *Suchand's case* inasmuch as there the person who paid the money had an incontestable tenant's right and the payment was made for the benefit both of himself and of the other tenants who were liable under the decrees and had no alternative but to pay the decretal debts. I agree with the learned trial Judge that upon the facts of this case the plaintiff's claim to compensation under section 70 of the Indian Contract Act is not established.

There remains Mr. Rao's second contention which is based upon the equitable doctrine allowing a stranger who pays off a subsisting mortgage to be subrogated to the position of the mortgagee. The facts, here again, are not in dispute. The mortgage of Atmaram was paid off with the help of the plaintiff's moneys by the first defendant, and it cannot, in my opinion, be doubted that the first defendant had an interest in paying off that mortgage. Therefore, if the doctrine is made out, the first defendant could claim to stand in the mortgagee's shoes, and if that be so, the same position would be occupied by the plaintiff who claims through the first defendant and whose moneys were advanced to the first defendant *precisely in order that Atmaram's mortgage* should be discharged. That the legal doctrine for which Mr. Rao contends is established is illustrated, I think, by Mr. Justice Warrington's decision in *Butler v. Rice*[2]. There is no objection to our reference to this English decision for the purpose of verifying a doctrine which, though not in terms contained in

(1) (1910) 38 Cal. 1. (2) [1910] 2 Ch. 277.

the Transfer of Property Act, is not inconsistent with any provision of that Act Indeed section 95 of the Act suggests that the doctrine was at least in part formally accepted by the Indian legislature Reference may also be made upon this point to the decision of their Lordships of the Judicial Committee in *Gokuldoss Gopaldoss v Rambux Seochand*[1] Now *Butler v Rice*[2] was a case where the plaintiff Butler upon an agreement to receive a mortgage for £300 advanced a sum of money to Rice in order that Rice might pay off certain mortgages of property belonging to Mrs Rice The money was accordingly paid and the mortgages were released, but all this was done without the knowledge of the mortgagor Mrs Rice It was contended in argument that mortgages in these cases are only kept alive where the charge is paid off at the express or implied request of the mortgagor That argument, however, was rejected by Mr Justice Warrington who observed that the statement of claim, or as we should say the plaint, proceeded on the well-known equitable doctrine that if a stranger pays off a mortgage on an estate, he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit I pause to observe that in our own case we have not only that presumption, but the sworn testimony of the plaintiff that such was in fact his intention As to the argument that Mrs Rice's knowledge was essential, the learned Judge observed that her concurrence was immaterial inasmuch as her position was not affected, for the only alteration in her position was that instead of owing the money to one creditor she owed it to another, and in the first words of the judgment in language which is perfectly apt to our present case, the learned Judge said that the question he had to determine was whether the mortgagor was entitled to hold the property discharged from the

[1] 1884 I L R 11 I A 126 [2] [1910] 2 Ch 277

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debt of £450, not one penny of which she had paid off herself, or whether the person who paid it was entitled to treat the charge as still on foot in his favour As the learned Judge answered that question against the mortgagor, so we must answer in the present case, where the similar question is whether the second defendant is entitled to hold this land free of an incumbrance of Rs 2,463, not one rupee of which he has ever paid himself, but every rupee of which has come from the pockets of the plaintiff I may add that the plaintiff's position is, if there be any difference, somewhat stronger than was Butler's position, for while Butler was a mere stranger, the plaintiff is claiming through a person with a clear interest in releasing the mortgage On these grounds I am of opinion that Mr Rao's second contention must be conceded and that the land in possession of the second defendant must be held chargeable with the sum of Rs 2,463

In my opinion, therefore, we should reverse the lower Court's decree and substitute for it a decree allowing the plaintiff the sum of Rs 2,463 to be recovered with interest at 6 per cent from the date of suit to the date of payment by the sale of one half of Survey No 172 Any deficiency between this sum and the total of Rs 3,113 should be recovered from the first defendant, being made payable in annual instalments of Rs 800 until complete satisfaction, the first such instalment to be due three months after the amount of the deficiency has been ascertained The plaintiff must have his costs here and in the Court below The sum if not paid by the second defendant within six months may be recovered by sale of the property

SHAH, J —I agree I desire to add a word with reference to Mr Bhat's argument that neither the plaintiff nor defendant No 1 was interested in satisfying the mortgage claim of Atmaram at the time, when the sum

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of Rs 2463 was paid by the plaintiff It is clear that, in spite of the previous purchase by defendant No 2 at a Court sale of the two survey numbers, the equity of redemption in the other property mortgaged to Atmaram was vested in defendant No 1 at the time The mortgage decree in favour of Atmaram was against him and was being executed against him at the time He was therefore clearly interested in satisfying Atmaram's decretal claim He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage decree to Atmaram at the instance of defendant No 1

Decree reversed

R R

APPELLATE CIVIL

1916

August 7

Before Sir Stanley Batchelor Kt Ag Chief Justice and Mr Justice Shah

VINAYAKRAO BALASAHEB INAMDAR AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS v SHAMRAO VITHAL KALKUNDRI AND ANOTHER (ORIGINAL DEFENDANTS) RESPONDENTS °

Dekkhan Agriculturists Relief Act (XVII of 1879) sections 3 (w) 12 and 13—Suit for redemption—Mortgage superseded by consent decree—Allegation of fraud—Form and reality of the suit

The plaintiffs father executed a mortgage in 1894, In 1899 the mortgagee sued the mortgagor for the recovery of the mortgage debt and for sale of the property In 1900 there was a consent decree by which a new sum was taken as capitalized principal and provision was made for payment of money by instalments The security under this arrangement differed in some particulars from the security of the earlier mortgage On the same day as this consent decree

° First Appeal No 192 of 1913

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was obtained Survey No 50 which was included in the older mortgage but was excluded from the purview of the consent decree, was sold by the mortgagor to the mortgagee In 1903 the mortgagee obtained possession of the property and since then remained in possession In 1911 the plaintiffs brought a suit to redeem the mortgage of 1894 by setting aside the consent decree and the sale deed alleging that they were obtained by fraud coercion and misrepresentation.

Held that the suit though in form a redemption suit was in reality a suit to set aside a sale deed and a Court's decree and then to recover property of which the plaintiffs had been fraudulently deprived Such a suit is outside the provisions of the Dekkhan Agriculturists Relief Act 1879

Musammat Bachi v *Bikhchand*(1) applied

Section 3 clause (w) of the Dekkhan Agriculturists Relief Act 1879, contemplates either simpliciter or primarily and substantially a mortgage suit

FIRST appeal against the decision of S R Koppikar, First Class Subordinate Judge at Belgaum in Civil Suit No 445 of 1911

Suit for redemption

The property in suit was, by a deed dated the 24th May 1894, mortgaged by Balaji Bhavanrao, the father of plaintiffs and defendant No 2, to Vithal Ramchandra, the father of defendant No 1, for Rs 5,000

In 1899 the mortgagee sued the mortgagor for recovery of the mortgage debt and for sale of the property

On the 9th March 1900 there was a consent decree the terms of which were —

The debt including interest was found to have amounted to Rs 9 650
As security for the sum the property originally mortgaged except Survey No 50 of Nerli and the additional property specified in para (*f*) of the plaint were to stand as security *The principal was made payable in 10 years*
At the end of 10 years the mortgagee was given the option of enjoying the profits in lieu of interest or recovering the debt by sale of the mortgaged property The mortgagor was at liberty to pay the principal before the fixed date in amounts not lower than Rs 1 000

On the date of the decree Survey No 50 which was included in the earlier mortgage but was excluded

(1) (1910) 13 Bom L R 56

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from the purview of the consent-decree, was sold by the mortgagor to the mortgagee for a sum of Rs 1,000

In 1903 the mortgagee on his application for execution of the consent-decree obtained possession of the property

In 1911 the plaintiffs sued as agriculturists to redeem the property which was the subject of the consent-decree as well as Survey No 50, alleging that both the decree and the sale deed relating to Survey No 50 were fraudulent and asked for an account on the footing of the original mortgage under the Dekkhan Agriculturists' Relief Act 1879

Defendant No 1 contended that the claim for redemption did not lie, as the original mortgage of 24th May 1894 was superseded by the decree of 9th March 1900, that the allegation of fraud, &c, was false, that the suit was untenable unless the consent-decree was first set aside by a separate suit

Defendant No 2 admitted the claim

The Subordinate Judge dismissed the plaintiffs' suit on the following grounds ,—

Plaintiffs seek to set aside the consent decree passed against their father and the sale effected by him on the ground of fraud and at the same time ask for special relief as agriculturists The decision of the Privy Council appearing at page 56 of the Bombay Law Reporter Vol 13 seems to me to be against this claim It shows that specific relief under the Dekkhan Agriculturists Relief Act cannot be claimed in a suit which is in form a suit for redemption but in reality is a suit to recover property of which the rightful owner has been deprived by fraud The claim as regards No 50 of Nerli is clearly covered by this authority The principle must be equally applicable to the claim relating to the property which came to defendant No 1 under the consent decree These are not the only difficulties in the way of plaintiffs

The consent decree of 1900 superseded the original mortgage and a suit to obtain redemption on the footing of that mortgage cannot lie The decision of the High Court in appeal No 15 of 1912 seems to be clear authority upon the point (Exhibit 117) The relation between the parties is not that of

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mortgagor and mortgagee but that of judgment debtor and decree holder their respective rights and liabilities must be determined by the terms of decree I L R 8 Bom 303 and 16 Bom 656 may also be quoted against plaintiffs The only remedy seems to be an application for execution

The cases quoted on the other side are not in point and are clearly distinguishable The decision at page 30 of 13 Bombay Law Reporter relates to decree which merely carried out the terms of the original contract of mortgage and which did not therefore supersede that mortgage The decree in the present case introduced a new relation between the parties The property encumbered in the original mortgage was only a part of the property given as security for the decretal debt The amounts secured by the mortgage and the decree were different One of the lands included in the mortgage was transferred by an independent sale to the mortgagee Above all the decree in this case gave defendant No 1 the option of enjoying the profits in lieu of interest or of bringing the property to sale on default of payment by the mortgagor In the case quoted the decree merely empowered the mortgagee to remain in possession until payment and did not give him the right of sale There is nothing in the present case to show that a future suit for redemption was contemplated 10 Bom 21 is an instance of Hindu brothers who were insufficiently represented in a previous suit for redemption and whose right of redemption was therefore held to have remained The Allahabad cases cited (32 All 215 24 All 44) are instances of decrees which conferred no right of sale on default of payment and it was therefore held that a second suit for redemption was not barred 13 Bom Law Reporter 1009 is the case of a mortgage passed in satisfaction of a decretal debt We are now dealing with the reverse case of a decree obtained in supersession of an antecedent mortgage

The plaintiffs appealed to the High Court

Jayakar with *S S Patkar* for the appellants —We submit the consent-decree is nothing more than a new mortgage The test is does the relationship of mortgagor and mortgagee still subsist? The lower Court holds that the consent-decree wipes out the position of mortgagor and mortgagee and there is no basis of the suit We submit the consent-decree is no more than a contract with the additional affirmation of the Court and the Court has as much power to look into it on the ground of fraud, &c, as into an ordinary contract It does not differ from the contract of parties sec

Krishnabai v *Hari Govind*[1], *Radhabai* v *Ramchandra Vishnu*[2], *Kisandas* v *Ramchandra*[3], *Rama* v *Bhagchand*[4]

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We submit therefore, the suit for redemption of the mortgage of 1894 does lie and the consent-decree being a transaction within the meaning of section 13 of the Dekkhan Agriculturists Relief Act, the Court ought to have inquired into the history of the transaction under sections 12 and 13 of the Act from 1894 up to the date of the suit These sections are introduced to relieve the transactions between the creditor and debtor under Dekkhan Agriculturists Relief Act, 1879

Coyajee with *G S Mulgaonkar* and *T R Desai* for respondent No 1 —We submit the present suit is outside the provisions of the Dekkhan Agriculturists Relief Act Section 3 clause (*w*), indicates the class of suits to which the Act is applicable This is not one of the suits contemplated by that section Before the mortgage of 1894 can be inquired into, the plaintiffs have got to set aside the consent decree and the sale deed which may be fraudulent but which were accepted from time to time by the Court This is, therefore, in form a suit for redemption but the substantial relief claimed is *getting over the two* transactions Special relief under the Dekkhan Agriculturists' Relief Act could not be granted in such a suit see *Musammat Bachi* v *Bikhchand*,[5] *Lachiram* v *Jana Yesu*[6]

As regards sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, we submit the initial difficulty in the way of the appellant is that in order to have the application of those sections, the suit must fall under section 3, clause (*w*) Once a decree is passed on a

(1) (1906) 31 Bom 15
(2) (1910) 35 Bom 204
(3) (1911) 13 Bom L R 1001
(4) (1914) 39 Bom 41
(5) (1910) 13 Bom L R 56
(6) (1914) 16 Bom L R 668

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mortgage and the amount due is determined, the Court cannot in a subsequent suit re open the accounts see *Tatya Vithoji* v *Bapu Balaji*[1]

Nilkanth Atmaram for respondent No 2

BATCHELOR, Ag C J —The appellants, who were the plaintiffs in the lower Court, brought this suit as a suit for redemption under the Dekkhan Agriculturists' Relief Act The mortgage to be redeemed was said to be that executed by the plaintiffs' father in 1894 In 1899, the mortgagee sued the mortgagor for recovery of the mortgage debt and for sale of the property In March 1900, there was a consent-decree by which a new sum was taken as the capitalized principal, interest was allowed at 7½ per cent, and provision was made for payment of the money by certain instalments The security under this arrangement differed in some particulars from the security of the earlier mortgage, and notably Survey No 50, which was included in the older mortgage, was excluded from the purview of the consent-decree On the same day as this consent-decree was obtained, Survey No 50 was sold by the mortgagor to the mortgagee for Rs 1,000 In 1903, the mortgagee, on his application for execution of the consent-decree, obtained possession of the property and has since remained in possession Therefore, in 1911, the plaintiffs brought the present suit In their plaint they set out the facts which I have summarised, and they claim to set aside the consent-decree as having been obtained by fraud, coercion and misrepresentation In the same way they seek to set aside the sale deed of Survey No 50 on the ground that it was nominal and fraudulent and procured by coercion

Mr Coyaji contends, and I think rightly, that such a suit is outside the Dekkhan Agriculturists' Relief Act

[1] (1883) 7 Bom. 330

1916

VINAYAKRAO BALASAHEB v SHAMRAO VITHAL

If reference be made to sections 3, 12 and 13 of that Act, it will be seen that the suit can only be brought within the statute if it is a suit for the redemption of mortgaged property within the meaning of the clause (*w*) of section 3 It is, in my opinion, clearly not within this clause the words of which contemplate a mortgage suit either *simpliciter* or primarily and substantially This, however, is something far more than that and very different from that It is a suit to set aside a sale deed and a Court's decree, and, when those things are done, to recover the property of which, according to the plaint, the plaintiffs have been fraudulently deprived This seems to me to be the description of the suit, and, if that is so, it falls I think within the authority of the Privy Council decision in *Musammat Bachi* v *Bikhchand*[1], where Lord Macnaghten said, in language which appears to me perfectly applicable to the present suit "In form it is a suit for redemption In reality it is nothing of the kind It is a suit to recover property of which the rightful owner has been deprived by fraud That settles the case" In the case before their Lordships of the Judicial Committee the obstacles which stood in the way of the immediate redemption were certain private sales made by the mortgagors to the mortgagees Here also the obstacle is in part the same For in part it consists of the private sale of Survey No 50 made by the mortgagor to the mortgagee in 1900 For the rest the impediment consists of the decree of a Court, which is not the less a decree because it was obtained by consent of parties I may add that on similar facts this Court took the view which I am now expressing in *Shamrao Vithal Kallundri* v *Nilkanth Ramchandra Kulkarni*[2] On these grounds it appears to me that the suit as brought is not main-

(1) (1910) 13 Bom L R 56 (2) (1912) 18 Bom L R 711 f n (2)

1916

VINAYAKRAO BALASAHEB v. SHAMRAO VITHAL

tainable That being so, we express no opinion as to the merits of the case on any other point of controversy between the parties The appeal must be dismissed with costs, the lower Court's decree being affirmed Respondent No 1 alone will have the costs

SHAH, J :—I agree

Decree affirmed

J G R

APPELLATE CIVIL

1916

August 7

Before Mr Justice Beaman and Mr Justice Heaton

MOTA HOLIAPPA AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS *v.* VITHAL GOPAL HABBU (ORIGINAL PLAINTIFF) RESPONDENT *

Civil Procedure Code (Act V of 1908), section 11—Res judicata—*Decision embodied in decree operates as res judicata*

In 1900 the defendants obtained a *mulgeni* (permanent) lease of certain lands from the then manager of the temple In 1910 the plaintiff the new manager sued the defendants in ejectment praying that the *mulgeni* lease was not binding on him and that the defendants being annual tenants should be evicted The Court held in favour of the plaintiff on the first ground but for want of notice held that he was not entitled at that stage to evict the defendants Then after due notice given the plaintiff again sued to eject the defendants They again pleaded the *mulgeni* lease The Court held that that defence was not open to them as it was barred by *res judicata* On appeal

Held that the defence was barred by *res judicata* for the decision of the Court in the earlier suit in favour of the plaintiff upon the first part of his prayer found a place in the decretal order and was as much decreed as the other part of the prayer which in the second part of that decretal order was rejected

SECOND appeal from the decision of C V Vernon, District Judge of Kanara, confirming the decree passed by V V Wagh, First Class Subordinate Judge at Karwar

* Second Appeal No 587 of 1915

Suit in ejectment

The lands in dispute were given in 1900 on mulgeni (permanent) lease by the then manager of the temple of Argi Shri Mahadev to defendants

In 1910, the plaintiff, the present manager of the temples sued to eject the defendants from the lands, praying first that the *mulgeni* lease was not binding on him, and secondly, that the defendants as *chalgeni* (yearly) tenants were liable to be evicted The Court held in plaintiff s favour on the first part, but as he had not given notice to the defendants to quit, the second prayer was not granted The order ran as follows —

It is declared that the *mulgeni* lease Exhibit 38 is not binding on the plaintiff. It is therefore set aside The plaintiff s suit is dismissed Each party should bear his costs

The plaintiff next gave notice to the defendants terminating the chalgeni lease , but as they did not give up possession, he filed the present suit to eject them

The defendants again pleaded that they were entitled to hold the lands under the *mulgeni* lease and that as the lease was more than 12 years old the plaintiffs' claim was time-barred

The Subordinate Judge held that the claim was not barred by limitation and decreed the plaintiff's claim, holding that the defendants were barred by *res judicata* from pleading the *mulgeni* lease, on the following grounds —

The defendants contend that as the plaintiff s suit is dismissed the finding regarding the *mulgeni* lease does not bind them But this is not so

The Court did not dismiss the suit so far in its entirety The Court allowed the suit so far as it related to the *mulgeni* and set aside the *mulgeni* When it was ordered by the Court the plaintiff's suit was dismissed it meant that it was dismissed so far as it related to the possession of the land claimed by the plaintiff In fact the plaintiff in that suit got all the relief he would

have been entitled to had he filed only a suit for having the *mulgeni* lease wrongly obtained by the temple's *chalgeni* tenants set aside.

The finding of the Court that the *mulgeni* is null and void has not merely remained a finding but has been made the subject of a positive decretal order setting the lease aside. That being so the defendants cannot again set up their *mulgeni* against the plaintiff. Their only remedy was to appeal from that order. As they have not appealed the order is binding on them.

On appeal, this decree was confirmed by the District Judge.

The defendants appealed to the High Court.

G. S. Mulgaokar, for the appellants.

Nilkanth Atmaram, for the respondent.

BEAMAN, J. :—We are clearly of opinion that if this suit were not *res judicata* by the decision of the suit of 1910 the plaintiff's claim would be barred by limitation. The only substantial question, therefore, is whether the present suit is *res judicata*. The point arises in this way. In 1900 the defendant obtained a *mulgeni* lease from the manager of the temple, the predecessor-in-title of the plaintiff. In 1910 the plaintiff sued, the suit taking the form of ejectment, to recover possession of the land from the defendant on the ground that the *mulgeni* lease was bad and no longer binding on him and that for breach of condition of the annual lease therefore the tenant was liable to immediate eviction. The plaintiff prayed for two quite distinct reliefs as is made abundantly clear from the judgment and the final order. Those reliefs were, first that it should be declared that the *mulgeni* lease of 1900 was invalid and not binding upon the plaintiff; second, that the plaintiff was thereafter entitled to evict the defendant as a *chalgeni* or yearly tenant from the land in suit. The Court decided in favour of the plaintiff on the first ground, but for want of notice held that he was not entitled at that stage to evict the defendant, that

is to say the suit was for a declaration and consequential relief, and the decree grants the declaration but dismisses the rest of the prayer of the plaintiff on account of a technical flaw Those being the facts the case is clearly we think distinguishable from the authorities to which our attention has been drawn such as *Ghela Ichharam* v *Sankalchand Jetha*,[1] *Rango* v *Mudiyeppa* [2] *Thakur Magundeo* v *Thakur Mahadeo Singh*[3] and *Parbati Debi* v *Mathura Nath Banerjee* [4] The general rule deducible from these cases is one which has our complete concurrence, viz, that where an issue not material to the decision has been decided and is not embodied in the decree it will not constitute *res judicata* against the party who by reason of the decree being in his favour would not be in a position to appeal against the decision upon the separable single issue That is not the case here As we pointed out the decision of the Court in favour of the plaintiff upon the first part of his prayer finds a place in the decretal order and is as much decreed as the other part of the prayer which in the second part of that decretal order was rejected In our opinion this constitutes clear *res judicata* so far as the point now before us is concerned We think that the defendant in that suit might have appealed had he wished to do so against so much of the decree as declared his *mulgeni* lease invalid and no longer binding upon the present plaintiff We think the whole difficulty has arisen out of an unfortunate looseness of language in the latter part of the decree What the learned judge undoubtedly meant was not that the plaintiff's suit is dismissed, but that the rest of the plaintiff's suit is dismissed, and this is made the clearer by the order of the Court which immediately follows "Each party to

(1) (1893) 18 Bom 597
(2) (1898) 23 Bom 296
(3) (1891) 18 Cal 647
(4) (1912) 40 Cal 29

1916

KAVASJI SORABJI v. BAI DINBAI

Motibai v *Karsandas Narayandas*[1] and *Dayabhai Tapidas* v *Damodar Tapidas*[2] The lower Court has decided this as a preliminary point against the applicant and decided it wrongly

There is a further question of fact to be answered The opponent denies that the applicant is a beneficiary under the will or has any interest whatever in the estate of the deceased If that be so, he would clearly have no *locus standi* in any such proceedings as these But that question must be dealt with by the learned Judge below

We set aside his order and remand the application to be disposed of in accordance with the foregoing observations

Costs to abide the result

Order set aside.

R R

(1) (1893) 19 Bom 123 (2) (1895) 20 Bom 227

APPELLATE CIVIL

1916
August 10

Before Sir Stanley Batchelor Kt Ag Chief Justice and Mr Justice Shah

KASHIBAI ALIAS JANKIBAI KOM RAMCHANDRA DINKARRAO GHATAGE (ORIGINAL PLAINTIFF) APPELLANT v. TATYA BIN GENU PAWAR AND OTHERS (ORIGINAL DEFENDANTS NOS 1 2 11 12 13 AND 14) RESPONDENTS *

Hindu Law—Adoption—Will in favour of a grand daughter—Simultaneous execution of adoption deed as well as will—Construction of documents—Adopted son's consent binding effect of—Disposition good as a family arrangement

One B died leaving him surviving his widow L and a predeceased son's daughter K (plaintiff) B before his death recommended L to adopt A

* Second Appeal No 123 of 1914

his brother's son L made the adoption by a deed dated the 10th June 1895 and simultaneously executed a will in favour of K On the strength of this will K claimed the properties in suit The Subordinate Judge decreed K's suit holding that the will being made with the full consent and concurrence of A who was then major must take effect On appeal the decree was reversed On appeal to the High Court

Held (1) that the adoption deed and the will must be read together and that so read they constituted a single family arrangement

(2) that the adopted son who was of full age having deliberately accepted the family arrangement and its advantages must be held to it

Visalakshi Ammal v *Sivaramien* (1) referred to

(3) that the disposition in favour of plaintiff was good not because it was a bequest made by L but because it was a part of the single family arrangement which all parties accepted

SECOND appeal against the decision of G K Kanekar, First Class Subordinate Judge A P at Sholapur reversing the decree passed by V P Raverkar, Subordinate Judge at Barsi

Suit to recover possession

The properties in suit belonged to one Bapurao bin Vithalrao He had only one son by name Nana who predeceased him

Bapurao died three or four days after Nana leaving him surviving his widow, Lakshmibai, Kashibai (plaintiff) the minor daughter of Nana and the widow of Nana

Bapurao before his death recommended Lakshmibai to adopt Anna (defendant No 1) his brother's son Lakshmibai accordingly passed an adoption deed in defendant No 1's name on the 10th June 1895, and simultaneously executed a will in favour of plaintiff The will was attested by defendant No 1 who was then major, by his father and by his brother who being a

(1) (1904) 27 Mad 577

1916

KAVASJI SORABJI *v* BAI DINBAI

Motibai v *Karsandas Narayandas*[1] and *Dayabhai Tapidas* v *Damodar Tapidas*[2] The lower Court has decided this as a preliminary point against the applicant and decided it wrongly

There is a further question of fact to be answered The opponent denies that the applicant is a beneficiary under the will or has any interest whatever in the estate of the deceased If that be so, he would clearly have no *locus standi* in any such proceedings as these But that question must be dealt with by the learned Judge below

We set aside his order and remand the application to be disposed of in accordance with the foregoing observations

Costs to abide the result

Order set aside.

R R

(1) (1893) 19 Bom 123 (2) (1895) 20 Bom 227

APPELLATE CIVIL

1916 *August* 10

Before Sir Stanley Batchelor Kt Ag Chief Justice and Mr Justice Shah

KASHIBAI ALIAS JANKIBAI KOM RAMCHANDRA DINKARRAO GHATAGE (ORIGINAL PLAINTIFF) APPELLANT *v* TATYA BIN GENU PAWAR AND OTHERS (ORIGINAL DEFENDANTS NOS 1 2 11 12 13 AND 14) RESPONDENTS*

Hindu Law—Adoption—Will in favour of a grand daughter—Simultaneous execution of adoption deed as well as will—Construction of documents—Adopted son s consent binding effect of—Disposition good as a family arrangement

One B died leaving him surviving his widow L and a predeceased son s daughter K (plaintiff) B before his death recommended L to adopt A

* Second Appeal No 123 of 1914

particular purpose which should take effect after his (here Lakshmibai's) death. The will in the present case being with the full consent and concurrence of defendant No. 1 who was major then must take effect against him and all persons claiming through him.

On appeal the First Class Subordinate Judge reversed the decree.

The plaintiff appealed to the High Court.

K. H. Kelkar for the appellant:—I submit the case rests solely on the construction of two deeds executed simultaneously by Lakshmibai independently of the oral evidence led in the case. The lower appellate Court was wrong in holding that the determination of the case rests solely on the appreciation of the oral evidence. When the two documents viz., the deed of adoption and the will are read together, they constitute a single family arrangement. Properties have been earmarked in both these documents which are also attested by defendant No. 1 who was then major, by his father and by his brother who acted as his legal adviser. The first defendant having accepted the family arrangement and its advantages is estopped from disputing the transaction: see *Visalakshi Ammal v. Sivaramien*.(1)

B. G. Rao for respondent No. 1:—The two deeds, viz., the deed of adoption and the will do not constitute any family arrangement when they are read independently of the oral evidence. The oral evidence is disbelieved by the lower appellate Court. Even if they are read together the effect is to confer upon the widow Lakshmibai an absolute power of disposition of property which has been held to be *ultra vires*: see *Ravji Vinayakrav Jaggannath Shankarsett v. Lakshmibai*,(2) *Venkappa v. Fakirgouda*(3) *Vyasacharya v. Venkubai*.(4) Beyond mere attestation by

(1) (1904) 27 Mad. 577.
(2) (1887) 11 Bom. 381 at p. 403.
(3) (1906) 8 Bom. L. R. 346.
(4) (1912) 37 Bom. 251.

qualified pleader acted as defendant No 1's legal adviser in these transactions It was under this will the plaintiff claimed title to the properties in suit

Defendant No 1 did not appear

Other defendants who were claiming under defendant No 1 contended that they were *bona fide* purchasers without notice of plaintiff's rights that as a Hindu widow Lakshmibai could not make the will and therefore plaintiff got no interest in the suit properties

The Subordinate Judge held that the adoption of defendant No 1 was conditional and it was agreed that the suit property should be Lakshmibai's absolute property which she could will away to the plaintiff He, therefore, decreed the plaintiff's suit on the following grounds :—

'The next question is whether such a condition and agreement is valid in law The point is covered by a long course of decisions of which it is sufficient to quote *Vinayak Narayan Jog* v *Govindrav Chintaman Jog* 6 Bom H C R 224 *Chitko* v *Janaki* 11 Bom H C R 199 (*A C J*) *Basava* v *Lingangavda* I L R 19 Bom 428 and *Lakshmi* v *Subramanya* I L R 12 Mad 490 The present case resembles very materially I L R 12 Mad 490 In the Madras case the adoptive father (here the adoptive mother) at the time of the adoption executed a document in the nature of a will making certain dispositions in favour of his widow (here in favour of her minor grand daughter) There it was found as I find here that the natural father (and here even the adopted son who was major) at the time of the adoption was aware of the arrangements in the will and consented to them and also but for such consent the adoption would not have taken place The adoption and the will formed parts of one and the same transaction and the case was thus one of conditional adoption The condition was upheld The following remarks of Shephard J are quite pertinent But for the consent of the natural father the adoption would never have taken place To object to the agreement is therefore tantamount to objecting to the adoption The adoption and the disposition of his property by the father (here adoptive mother) being part of one transaction the son never acquired any interest in the property disposed of The will was only a means by which the supposed contract was carried into effect It was a term of that contract that certain property should be withdrawn from the estate and applied to a

consider and determine is the effect of the two contemporaneous documents executed on the 10th June 1895 in the presence of many witnesses It appears to me indisputable that these two documents must be read together and that so read they constitute a single family arrangement disposing of the properties to which they refer Certain of those properties are specified in the instrument in the plaintiff's favour while the others are similarly specified in the deed of adoption of the 1st defendant In this latter deed it is made quite clear that the 1st defendant is the adopted son of Bapurao bin Vithalrao will be entitled, not to the whole property of his adoptive father but only to that particular portion of it which is described in the document

The will in favour of the plaintiff is attested by the 1st defendant, by his father and by his brother, that brother being a qualified pleader, who was the 1st defendant's legal adviser in these transactions It must therefore in my opinion, be inferred that the 1st defendant who was then of full age, deliberately accepted this family arrangement and that he took the advantage which the arrangement conferred upon him That being so, it appears to me that in this appeal we are not concerned with that class of cases which consider the position when a bargain made between the adopting widow and the guardian of an adopted infant diminishes the estate which the adopted son would otherwise take The essential fact here is that the adoptee at the time of his adoption was of full age There appears no particular authority in which the legal position of such an adopted son is formally considered, but in *Visalakshi Ammal* v *Sivaramien*,[1] Sir Subrahmania Ayyar, Offg Chief Justice, and Mr Justice Benson in making the reference to the Full Bench expressed the following opinion upon the point

[1] (1904) 27 Mad 577 at p 582

1916

KASHIBAI v TATYA

defendant No 1, there is no evidence to show that defendant No 1 assented to any family arrangement, mere attestation of a document does not import any concurrence in the provisions of that document see *Hari Kishen Bhagat v Kashi Pershad Singh* [1]

BATCHELOR, Ag C J —The circumstances giving rise to this appeal are these The plaintiff is the daughter of one Nana, who was the son of Bapurao bin Vithalrao On Nana's death, his father Bapurao took an absolute estate in the property by survivorship Bapurao, however, survived his son only four days On his death, his widow Lakshmibai became entitled for a widow's estate Bapurao before his death recommended Lakshmibai to adopt the 1st defendant, who is Bapurao's brother's son At the same time there was a grand-daughter, the present plaintiff, to be provided for Thus at one and the same time Lakshmibai by two documents made the adoption of the 1st defendant, and also executed what is termed a will, devising certain property to the plaintiff The 1st defendant did not appear at the trial of the suit, and the contesting defendants now are alienees from the 1st defendant

In the Court of first instance, Mr V P Raverkar in a careful judgment decreed the plaintiff's suit That decree was reversed on appeal to the First Class Subordinate Judge, Mr Kanekar But of his judgment it will be enough to say that no one before us has relied upon it, and it has appeared extremely difficult to extract from it any intelligible principle

The question before us is whether the plaintiff is entitled to the property that she claims The claim in the plaint is based upon the provisions of the will of Lakshmibai But in reality what we have to

(1) (1914) 42 Cal 876

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KASHIBAI v. TATYA

On these grounds it appears to me that the trial Court's decision is right, and that the plaintiff under the arrangement made is entitled to the property which she claims. I would therefore reverse the decree under appeal and restore that of the Subordinate Judge of trial with costs throughout.

SHAH J.—I agree.

Decree reversed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Beaman and Mr. Justice Heaton.

KASHINATH KRISHNA JOSHI (ORIGINAL DEFENDANT), APPELLANT v. DHONDSHET BHAVANSHET SHETYE (ORIGINAL PLAINTIFF), RESPONDENT.*

1916 August 14.

Res judicata—*Civil Procedure Code (Act V of 1908), section 11—Sale of Khoti lands on the basis that they are alienable—Subsequent suit between the parties on the allegation that the lands were inalienable—Khoti Settlement Act (Bombay Act I of 1880), section 9.*†

Certain Khoti lands were sold in execution proceedings between the parties on the footing that they were alienable and purchased by the defendant.

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* Second Appeal No. 1118 of 1915.

† 9. The rights of Khots, Dharekaris and quasi dharekaris shall be heritable and transferable.

Occupancy tenants' rights shall be heritable but shall not be otherwise transferable without the consent of the Khot, unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy independently of the consent of the Khots at some time within the period of thirty years next previous to the commencement of the revenue year 1865-66 or unless in the case of an occupancy right conferred by the Khot under section 11 the Khot grants such right of transfer of the same.

Provided that an occupancy tenant may without the consent of the Khot grant a lease for a term not exceeding one year.

1916

KASHIBAI
v.
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"Except where the person given in adoption is of full age and assents to the conditions and agreements between the parties giving and receiving, a case which would be very rare, and in which such assent would preclude any question like the present being raised, the transaction would take place without any reference to the adopted son's will and consent." This expression of opinion favours the view which I am taking, that the 1st defendant having deliberately accepted the family arrangement and its advantages must now be held to it. It appears to me no answer to say that the widow Laxmibai was not empowered to bequeath her husband's property to the plaintiff, and that if she had no such power in law, she certainly did not obtain it by reason of the adoption. It must be admitted that Laxmibai had no such power. But the disposition in the plaintiff's favour seems to me to be good, not because it was a bequest by Laxmibai, but because it was part of the single family arrangement which all the parties accepted, including the 1st defendant. The ground of the plaintiff's successful claim seems to me in other words to be, not Laxmibai's will, but that of which this will is evidence, namely, the family arrangement. Mr. Rao has called our attention to the well-known decision of their Lordships of the Privy Council in which it was laid down that the mere attestation of a document must not be taken to import any concurrence in the provisions of that document. But our decision is far from infringing this pronouncement. For in this case we have, in order to prove the 1st defendant's acquiescence in the arrangement, not only the attestations of himself and his legal adviser on Laxmibai's will, but also the more eloquent fact that he was content to accept the deed of adoption, which in terms restricted the property to which he was entitled.

1916

KASHINATH KRISHNA *v.* DHONDSHET

Code can apply to the present case see *Raghunath Mukund v. Sarosh K. R. Kama* [1] *Sundar Singh v. Ghasi* [2] *Krishnabhupati Devu v. Vikrama Devu* [3] *Balvant Santaram v. Babaji* [4] *Venkapa v. Chenbasapa,* [5] *Ananthararazu v. Narayanarazu* [6] The sale is void and no bar of *res judicata* can apply to defeat a statutory provision *Dattatraya Ramchandra v. Nilu Bachaji,* [7] *Shridhar Balkrishna v. Babaji Mula* [8]

BEAMAN J —We have had a very full and interesting argument upon the two points raised in this appeal viz whether the plaintiff's contention, which succeeded in the Courts below, is not *res judicata* against him, and whether his prayer to have the sale of 1912 set aside is not time-barred

We are of opinion that this is not a case of an alleged *res judicata* against a Statute, and we are therefore not called upon to examine certain cases which have been cited to us and which on a first view may appear to be in conflict What we think clearly was *res judicata* here was the question of fact raised again by the plaintiff in this suit and decided in his favour viz, whether or not the lands sold at the Court sale of 1912 were occupancy lands within the prohibition of section 9 of the Khoti Settlement Act That was a point which the plaintiff, if he meant to rely upon it at all, was bound to take we think, at the time the Court proposed to sell the land in suit It is not as though it was then admitted that the lands to be sold were occupancy lands Had that been so, no Court could have been found to sell them in the face of the direct prohibition of the Legislature When, therefore, we find the Court selling these lands without any

(1) (1898) 23 Bom 266
(2) (1896) 18 All 410
(3) (1894) 18 Mad 13 at p 17
(4) (1884) 8 Bom 602
(5) (1879) 4 Bom 21
(6) (1911) 36 Mad. 383
(7) (1898) P J 378
(8) (1914) 38 Bom 709

1916

KASHINATH KRISHNA v. DHONDSHET

The plaintiff then filed a suit to recover possession of the lands on the allegation that the lands being occupancy lands their sale was invalid under section 9 of the Khoti Settlement Act 1880 —

Held that the plaintiff's allegation was barred by *res judicata* inasmuch as the sale in execution decided inferentially as between the plaintiff and the defendant that the lands sold were not occupancy lands

SECOND appeal from the decision of M B Tyabji, District Judge of Ratnagiri, confirming the decree passed by R Bamdur, Second Class Subordinate Judge at Chiplun

Suit to recover possession of lands

The defendant, a Khot, obtained a decree against the plaintiff, in execution of which he had certain Khoti lands sold at a Court sale and purchased them himself Later, the defendant was put into possession of the lands

The plaintiff next sued to recover possession of the lands on the allegation that the lands being occupancy lands, the sale thereof was void under section 9 of the Khoti Settlement Act (Bom Act I of 1880)

Both lower Courts held that the lands were Khoti Kulargi (occupancy tenure) and that their sale was illegal and void The plaintiff's suit was, therefore, decreed

The defendant appealed to the High Court

V B Virkar, for the appellant —The question whether the property is not saleable is concluded as *res judicata* *Umed* v *Jas Ram*,[1] *Chhaganlal* v *Bai Harkha* [2]

P B Shingne for the respondent —There was no obligation to take the objection that the property could not be sold in the execution proceedings None of the provisions of Order XXI of the Civil Procedure

[1] (1907) 29 All 612

[2] (1909) 33 Bom 479

That being so, we have little hesitation in coming to the conclusion that the appellant's contention upon this point is sound and must prevail It becomes, therefore unnecessary to go into the second equally interesting point of limitation upon which the appellant has relied

1916

KASHINATH KRISHNA v DHONDSHET

We think that the appeal must be allowed and the plaintiff's suit dismissed with all costs on him throughout

Appeal allowed

R R

APPELLATE CIVIL

Before Sir Stanley Batchelor Kt Ag Chief Justice and Mr Justice Shah

RAMCHANDRA DHONDO KULKARNI (ORIGINAL PLAINTIFF) APPELLANT v MALKAPA BIN NARSAPA DEVARE AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS *

1916

August 18

Civil Procedure Code (Act V of 1908) section 11—Prior suit to set aside alienation made by minor's mother—Mortgagee not made party to the suit—Mortgage created by alienee before suit—Subsequent suit by mortgagee to support alienation—Partial representation by mortgagor parties—Subsequent suit not barred by res judicata—Meaning of words claiming under

The property in suit originally belonged to one Devare In 1883 during the minority of Devare his mother sold it to the Bhojes from whom one Bavachi received it in exchange for another parcel of land In 1891 by a simple mortgage Bavachi mortgaged the property to the plaintiff In 1898 a suit was brought by Devare against his mother Bavachi and the Bhojes in order to set aside the sale by his mother to the Bhojes That suit was successful and the result was that the sale to Bhojes was set aside In 1901 the plaintiff obtained a decree on his mortgage against Bavachi The property was put to sale and was purchased by the plaintiff with permission. But

* Second Appeal No 472 of 1914

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Kashinath Krishna v. Dhondshet

challenge by, or protest on behalf of, the judgment debtor, we take it that they must have been sold on the basis of the judgment-debtor having a saleable interest in them *Omnia præsumuntur rite esse acta* Inferentially, then, the sale of 1912 decided as between the plaintiff and the defendant, that is to say, the judgment-debtor and judgment-creditor, that the lands sold were not occupancy lands Here the plaintiff has brought the suit to have it established that they were, and he was allowed to raise that question of fact and the whole case has turned upon the answer to it It is precisely that part of the plaintiff's present suit which, in our opinion, was *res judicata* within the language and spirit of section 11 of the Civil Procedure Code

Much has been said here upon the applicability of certain rules in Order XXI to the case of a judgment-debtor Mr Shingne argued that part of the respondent's case with very great thoroughness and ability, and for my part I am very clearly of opinion that none of those rules were ever intended to apply to the judgment-debtor himself

It is not upon that ground that we think the plea of *res judicata* is here established so much as upon general principle and having regard to what is in controversy, what was and is to be inquired into and what has in fact been finally determined in this case by the executing Court between the executing creditor and judgment-debtor The present suit is really a continuation of that execution proceeding or at any rate has been treated as such in both the lower Courts The parties are, therefore, the same and what has resulted is that a question of fact, which, as we have shown, was decided, if not explicitly yet by necessary implication between them in 1910, has been allowed to be re opened and investigated and adjudicated upon, a second time

refer only to such of them as are necessary for the decision of the point with which we are now concerned. The original owner of this property was the first defendant Devare. In 1883, during the minority of Devare his mother purported to sell it to the Bhojes, from whom Bavchi in 1890 received it in exchange for another parcel of land. In 1891, by a simple mortgage Bavchi mortgaged the property to the present plaintiff, who is the appellant before us. In 1898 a suit was brought by Devare against his mother, Bavchi and the Bhojes in order to set aside the sale by Devare's mother to the Bhojes. That suit was successful, and the result was that the sale to the Bhojes was set aside. In 1901, the plaintiff obtained a decree on his mortgage against Bavchi and the others. The property was put to sale and was purchased by the plaintiff with permission. But when the plaintiff proceeded to endeavour to get possession, he was resisted by Devare. Hence the present suit to recover possession.

The only question now before us is whether, in spite of the result of Devare's suit of 1898, it is open to the plaintiff now to show, if he can show, that the alienation by Devare's mother to the Bhojes was good in law, as, for instance, it would be if the plaintiff could succeed in proving that the sale was for recognised necessity. It is contended against the plaintiff that it is not open to him to lead evidence in this sense for that he is bound by the decree against his mortgagor in 1898 by virtue of the provisions of section 11 of the Civil Procedure Code. It is admitted that all the provisions of that section imposing the application of the doctrine of *res judicata* are satisfied against the plaintiff, except the provision which requires that the former suit must have been either between the same parties, or between parties under whom they or any of them claim. Admittedly the suit of 1898 was not

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RAMCHANDRA DHONDO v MALKAPA

The plaintiff preferred a second appeal

K H Kelkar, for the appellant —We submit that we are not bound by the result of the suit No 1102 of 1898 In that suit our mortgagor Bavachi was represented but whatever interest we had as mortgagee was not represented If at all there was a partial representation see *Sita Ram* v *Amir Begam*,[1] *Abdul Alli* v *Miakhan Abdul Husein*,[2] *Joy Chandra Banerjee* v *Sreenath Chatterjee*[3]

A G Desai for respondent No 1 —We submit that the appellant's mortgagor Bavachi having been made a party to suit No 1102 of 1898, the decision in that suit is binding on the appellant The case of *Sita Ram* v *Amir Begam*[1] does not apply to the facts of this case Here we are concerned with one in whom the rights of the mortgagor and mortgagee are vested The moment the appellant became the purchaser, no distinction is to be made between his rights as mortgagor and mortgagee He becomes the full owner see *Bhawani Kuwar* v *Mathura Prasad Singh*[4] He cannot say that he is bound so far as his equity of redemption is concerned but not so far the mortgage rights are concerned Here it cannot be denied that the estate was properly represented as the mortgagor Bavachi was in possession and contested the suit We have thus to ascertain whether at the time of this suit the plaintiff does or does not "claim under" his mortgagor If he does, he is bound by the decree obtained against that mortgagor in the suit of 1898

J G Rele, for respondent No 6

G R Desai, for respondents Nos 7 to 9

BATCHELOR, Ag C J —The facts in this second appeal are somewhat complicated, but we propose to

[1] (1886) 8 All. 324 at p 338
[2] (1911) 35 Bom 297
[3] (1904) 32 Cal. 357
[4] (1912) 40 Cal 89

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refer only to such of them as are necessary for the decision of the point with which we are now concerned. The original owner of this property was the first defendant Devare. In 1883, during the minority of Devare his mother purported to sell it to the Bhojes, from whom Bavchi in 1890 received it in exchange for another parcel of land. In 1891 Bavchi mortgaged the property by a simple mortgage to the present plaintiff, who is the appellant before us. In 1898, a suit was brought by Devare against his mother, Bavchi and the Bhojes, in order to set aside the sale by Devare's mother to the Bhojes. That suit was successful and the result was that the sale to the Bhojes was set aside. In 1901 the plaintiff obtained a decree on his mortgage against Bavchi and the others. The property was put o sale and was purchased by the plaintiff with per-ussion. But when the plaintiff proceeded to endeav-ai to get possession, he was resisted by Devare. Hence the present suit to recover possession.

The only question now before us is whether, in spite of the result of Devare's suit of 1898 it is open to the plaintiff now to show, if he can show, that the alienation by Devare's mother to the Bhojes was good in law, as, for instance it would be, if the plaintiff could succeed in proving that the sale was for recognised necessity. It is contended against the plaintiff that it is not open to him to lead evidence in this sense for that he is bound by the decree against his mortgagor in 1898 by virtue of the provisions of section 11 of the Civil Procedure Code. It is admitted that all the provisions of that section imposing the application of the doctrine of *res judicata* are satisfied against the plaintiff, except the provision which requires that the former suit must have been either between the same parties, or between parties under whom they or any of them claim. Admittedly the suit of 1898 was not

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between the same parties The question, therefore, is whether the present plaintiff can properly be said to be claiming under his mortgagor Bachi.

The argument against him is that since he became the auction purchaser in 1894, the title to the whole estate rests in him without reference to any original distinction as to his position as mortgagee that since at the time of this suit, he was the owner of the property, he in this suit must be held to be claiming under the former owner, namely his mortgagor Bachi. The answer, however, to this argument seems to us to be afforded by a rather closer consideration of the principle upon which section 11 is based. As we understand it, that principle is that there must be between the parties in the earlier and the later suit some privity In the particular case before us that privity would be privity of estate in other words the principle comes into operation only if in the earlier litigation the estate in controversy was efficiently represented

That being so we must consider how far this estate was efficiently represented by the mortgagor Bachi at the time of Devare's suit in 1898 At that time the present plaintiff was a mere mortgagee, and Mr Justice Mahmood's decision in *Sita Ram* v. *Amir Begam* is authority for the view that as a mere mortgagee the plaintiff would not be bound by the earlier decision because his title arose prior to the suit in which the decree against his mortgagor was obtained and the mortgagor possessing only the equity of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage So in *Bonomalee Nag* v. *Koylash Chunder Dey*[2] it was held that a mortgagee not in possession, suing for a declaration that a right of way did not exist was not bound by a decision in a suit between the mortgagor and a third party of which

(1) (1886) 8 All 324 at p 338 (2) (1878) 4 Cal 692

[illegible] decision was 1911
[illegible] the entire estate
[illegible] the latter case [illegible]
[illegible] some hesitation But
Mr [illegible] fully [illegible] judgment
[illegible] succeeds we think
[illegible] was based upon sound
principle If [illegible] Mr Justice Mahmood
and [illegible] of the American text writer,
Bigelow [illegible] the privity is property and not
the personal relation then we do not understand how
the present plaintiff is in any worse position merely
because in 1901 he altered his original position of
mortgagee to that of auction purchaser For, notwithstanding that alteration the question would still be, not what was the plaintiff's position in 1901 but whether in 1898 the mortgagor possessed sufficient estate to represent and bind his mortgagee Now at that time the estate vested in the mortgagee and it seems to us difficult to hold that that estate was sufficiently represented in the absence of the party in whom in law it vested It might no doubt be a different thing if the plaintiff's mortgage had been taken after the suit of 1898 But here the fact is that the plaintiff's title arose prior to the litigation in which the mortgagor was defeated There are apparently no other decisions exactly in point but *Joy Chandra Banerjee* v *Sreenath Chatterjee*[1] and *Abdul Alli* v *Mialhan Abdul Husein*[2] may be referred to as cases of a simpler type where the decisions lend support to the view which we are taking Those were cases, one of a sale and the other of a gift and it was held that the alienee was not estopped by a judgment in a suit against the alienor, the suit having been commenced after the alienation And the ground

(1) (18[illegible]) 8 All 24 at p 339
(2) (1904) 32 Cal 357
(3) (1911) 35 Bom 207

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[illegible]

upon which these judgments were based is that stated by Mr Justice Romer (as he then was) in *Mercantile Investment and General Trust Company v River Plate Trust, Loan, and Agency Company*[(1)] that is to say "a prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase"

These decisions go so far at least as to show that some restriction must be placed on the apparent ambit of the words "claiming under" used in section 11 In those cases no doubt the estate in litigation was wholly unrepresented in the earlier suits, while here it must be admitted that the estate was in the suit of 1898 partially represented The consequence, however, seems to us to be the same For in either class of cases you have the absence of the legal requirement that the estate shall in the former litigation have been efficiently represented

On these grounds we are of opinion that the question argued must be decided in favour of the plaintiff that the lower appellate Court's decree must be set aside, and the appeal must be remanded for decision on the merits Costs will be costs in the appeal As to the respondents Nos 7 to 9, we have heard the learned pleader for the appellant, but we agree with the judgment of the lower appellate Court that no claim for Survey No 13 can be made in this suit This finding will be taken into account by the lower [illegible] Court when the final decree is passed As a[illegible] [illegible]ndent No 6, the suit is dismissed with cost[illegible] [illegible] disclaimed all interest in the property

I.—Miscellaneous Publications

Table showing [illegible] of Legislation in the Governor General's Council during 1914 [illegible]

Annual Indexes to the Acts of the Governor General of India in Council for 1914 and 1914. The Price is noted on them.

Proceedings of the Council of the Governor General of India [illegible] 1914 [illegible] 12a. (2a.)

[illegible] Council of the Governor General of India for making Laws [illegible] 1914 [illegible] date. Super royal 4to. Annual subscription Rs. 5 (Rs. 1)

[illegible] Orders [illegible] List of General Rules and Orders—

Do. [illegible] of 1914

Do. [illegible] No. II of 1914

Do. [illegible] No. I of 1915

[illegible] in Council [illegible] of the Governor General

Ditto [illegible] in the year 1913 — 3a. 3p. (1a.)

Declaration of London [illegible] ditto 1914 — 3a. 9p. (1a.)

The Official [illegible] 1909 — 1a. 3p. (1a.)

The [illegible] 1911 — Royal 8vo. paper cover 2a. 6p. or 3d. (1a.)

The [illegible] Rules 1914 (as amended by the Order in Council dated [illegible] 1914) (1 and 2 Geo. 5 Ch. 28) 3a. 8p. (1a.)

Legislation and Orders relating to the War — Royal 8vo. paper cover 5a. or 7d. (1a.)

[illegible] Third Edition. Royal 8vo. Paper 8a. (2a.)

Digests

A Digest of Indian Law Cases for 1913 containing High Court Reports and Privy Council Reports of appeals from India [illegible] — Rs. 4-4 or 6s. 6d. (4a.)

A Digest of Indian Law Cases for 1914 containing High Court Reports and Privy Council Reports of appeals from India [illegible] — Rs. 4 or 6s. 6d. (4a.)